No. 2924.

—IN THE—

United States Circuit Court of Appeals

—FOR THE—

Ninth Circuit

ISABELLE GARWOOD,
Plaintiff in Error,

vs.

JOSEPH SCHEIBER and MORRIS SCHEIBER and JOHN SCHEIBER,
Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

By A. H. HEWITT.

Filed this ..... day of March, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By ....., Deputy Clerk.

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Brief on Behalf of Defendants In Error

STATEMENT OF THE CASE.

The statement of the case as contained in the brief of counsel for plaintiff is controverted in many particulars by the defendants, and it is quite fitting that we should give to the court a concise statement of the facts as they appear from the record.

In September, 1911, the defendants were the owners of the ranch in Sutter County, commonly known as the "Allgier Ranch."

It and the personal property on the same was for sale. No contract in writing for the sale of the property was signed by the owners thereof until the 27th day of September, 1911. This contract was for the sale of the personal and real property, and the contract appears in full in the answer of the defendants (Tr. p. 34.) Some months prior to this date a contract had been entered into between the owners of the property and the Colonization Company, but it had expired and was not renewed. The purchase price of the personal property was $21,609.00 and of the real property $75,000.00. This contract of sale and purchase was made directly with the owners of the property and not by any agents of defendants. It does not appear from the record that any agents of defendants had any power to bind them. In fact just the contrary appears from the receipt the Colonization Company gave to Miss Garwood when she paid the deposit money (Dfts. Ex. b.) The receipt on its face shows that it was subject to the approval of the owners of the property.

The ranch was sold as a whole and not by the acre. There was no shortage in acreage. The farm actually contained 609.9 acres. It was bought by plaintiff after a personal examination. The evidence shows that she and her agent were on the place looking it over and inspecting it at least three times prior to the purchase. No fraud or deception was practiced by defendants or by any one else in their behalf. The plaintiff ob-

tained value received for her money. It is true that there was some conflict in the evidence but the finding on this conflict was against plaintiff and the judgment of the trial court must stand unless error was committed.

ARGUMENT OF DEFENDANTS.

The specification of errors as made by plaintiff and as argued by her counsel are so closely related they may be properly discussed together.

It seems that the chief complaint is made on the theory that the judgment is unsupported by the evidence. On this point evidently counsel can see no evidence except that of plaintiff. We think that he will concede that if the land was sold as a whole instead of by the acre that about nine-tenths of his brief is inapplicable. In discussing this case we are going to quote largely from the brief that we filed with the trial court, for in that brief every one of the points made by plaintiff was discussed. Before proceeding, however, we wish to call the attention of this court to the fact that all the evidence contained in the transcript from the bottom of page 336 was taken before a Commissioner and no rulings have been made on any of the objections of defendants to the testimony of plaintiff that should have been presented in chief. No request was made by plaintiff to reopen the case and for that reason we affirm that the testimony offered by her following page 399 of the transcript should not be considered.

In an action of this character it is essential that the plaintiff show by *clear and decisive proof* the existence of *six distinct elements* before she is entiled to recover, and these six elements, *each*

and all of which must be so established, are the following:

I. That the defendants have made a representation or representations in regard to a *material fact.*

II. That such representations were false.

III. That such representations were not actually believed by the defendants, on reasonable grounds to be true.

IV. That they were made with intent that they should be acted on.

V. That such representations were acted on by the plaintiff and in so acting on them she was ignorant of their falsity and reasonably believed them to be true.

VI. That she acted on these representations to her damage.

The *Supreme Court of the United States* in a case arising in California, to-wit:

> *Southern Development Co.* vs. *Silva,* 125 United States, 250,

laid down the above requirements in cases of this character.

The case has been affirmed frequently by later decisions of the United States Supreme Court.

See

> *Farnsworth* vs. *Duffner,* 142 United States, 43;
>
> *Shappiris* vs. *Goldberg,* 192 United States, 232-40,

and was adopted as the law of this State in the case of

Oppenheimer vs. *Clunie,* 142 Cal. 313-318,

and reiterated in an action for damages for alleged fraudulent representations in connection with a transfer of real property in the case of

Maxon-Nowlin Co. vs. *Norwing,* 166 Cal, 509-510,

where many other California cases sustaining the above principles are cited with approval.

We will discuss the case in the order in which the above principles are stated and the additional ground covered by our brief will be:

VII.

That the plaintiff elected to rescind and is bound by that election.

I.

Did the defendants make representations in regard to material facts?

The plaintiff presents in her original complaint certain representations which she claims were false and known to be false, and upon which she alleges she relied. It is necessary for her to prove these by clear and convincing testimony, or, as the Supreme Court of the United States says, "by clear and decisive proof." We will take them up in their order: (a) That Morris Scheiber pointed out the boundaries of said land as follows:

That he pointed to the levee on the East bank of the Feather River and called plaintiff's attention to the same and stated that the western

boundary of said ranch ran along said levee Northward to a point near a white house, and from there eastward along a certain fence which he indicated to a point beyond a grove of oak trees, which he also indicated, and from there in a general southerly direction; and thence at right angles back in a westerly direction to the levee on the river bank; that the expanse which he indicated and showed to plaintiff was clear and level land, and said defendant, Morris Scheiber, then and there represented to plaintiff that said six hundred acres were all clear, level land identically the same as that directly about them where they stood; that said defendants and defendants' agents in dealing with plaintiff and enticing plaintiff to purchase said land at all times represented to plaintiff that said place contained six hundred acres of clear arable land * * * *

Counsel for plaintiff has devoted pages of his brief to the assumption that it was represented that the place contained exactly 600 acres; that, in fact, it did not contain 600 acres; that the sale was by the acre and that, therefore, plaintiff is entitled to damages for the difference in acreage.

Counsel seems to have entirely misconceived the allegations of the complaint and the facts in the case. As a matter of fact, the plaintiff was sold 600 acres of land, more or less, and she actually obtained 609.9 acres, and her title to the 609.9 acres has been perfected and she is the owner thereof, basing her ownership upon the Deed from the defendants. Therefore, plaintiff's voluminous brief in the case covering this point is of no particular benefit.

The point involved and the claim of plaintiff is, and what we have to meet is, the allegation and contention that the defendant Morris Scheiber (or for that matter any other defendants, though Morris Scheiber is alleged as the one who did so) pointed out the land by description set forth in lines 17 to 33 on Page 4 of the Complaint (Tr. p. 6), and represented the boundaries as stated in the Complaint and falsely stated then and there that there were 600 acres of all clear level land identically the same as that directly about them where they stood.

The evidence is conclusive that there were more than 600 acres. The question is: Did the defendants represent the *boundaries as stated and did they represent that the land was all clear and level land exactly like that directly about them—that is, about where they stood.*

It is apparent at once from the testimony of the plaintiff herself and of all the witnesses in the case that no such representation was ever made.

The question whether or not she believed or acted upon such representations will be discussed in subdivisions V and VI of this brief.

The question then is as to what was represented in reference to the boundaries and the land being clear and level land.

The Court, of course, will bear in mind that in an action for deceit it is not a question whether or not the plaintiff may have reached certain erroneous conclusions from what was said to her or from her misinterpreting what was said. That is not the gist of an action for deceit. The rep-

resentations must actually be made and they must actually be false and they must actually be known to be false or such as should have been known to be false and they must have been made falsely with the intent to deceive, and the plaintiff must have believed the false representations and must have actually relied thereon to her damage, and the burden is upon the plaintiff to prove by clear and decisive evidence each and all of the various elements necessary to establish her cause of action.

The plaintiff admits that the boundaries of the land were actually pointed out to her the next day after the land was first called to her attention; that she actually was on the premises and saw with her own eyes the conditions there existing.

Now what does she say under oath that the defendant or defendants told her about the boundaries?

On Page 169 of the Transcript we find Miss Garwood saying: "Well, *I had no idea* of buying the ranch. I was trying to *entertain them,* and I said 'where is this land?' and they pointed at the levee and they said '*along that green line*' * * *"

Q. Do you remember which one of the brothers that was?

A. I think it was *Morris, the little one.* Right along that *green line* to the white house. And I said '*what green line*' and they made it *more explicit* and they said '*down that fence* to those trees *and across those trees,* from the lower fence up to that grove.' *That is the only description I ever heard of the property in my life.*"

We have then these words according to plaintiff's own testimony as the representation made by one of the defendants namely, *Morris, the little one* (and, by the way, Morris is the little one).

Here is the language freed from conclusions:

"Where is the land?" And they pointed at the levee (meaning in the direction of the levee as what they said clearly shows) and said "Along that green line." (The proof shows later that the levee was not green, but that the trees beyond were green) "Right along that green line to the white house," And I said "What green line?" and they made it more explicit and they said "Down that fence *to those trees and across those trees*" (and) "from the lower fence up to that grove."

The description referred to by plaintiff is of the westerly or Feather River boundary and the Feather River is across those green trees. Thus, according to plaintiff's own sworn testimony of the representations when she asked *what green line he referred to,* the defendant did not say that it was the *"levee,"* nor did he anywhere in this representation use the word *"levee."* When she asked him what green line she says he made it more explicit and said *"down that fence to those green trees and across those trees."* This is exactly what the defendants did represent to her and it was the truth and nothing but the truth, though they were even more explicit and in fact they added to what she admits: "to the old Feather River and along the river to a point near the white house, etc."

That something was said about the river being

the boundary and that plaintiff thought that the line went to the river is made absolutely clear by her own testimony found on Page 170:

Q. Did you know what river lay behind that levee?

A. *I thought it was the Sacramento.* I thought that was the same levee I had been on before.

Thus, according to plaintiff's own testimony there was absolutely no misrepresentation as to the alleged misrepresented boundary. It may be possible that she thought the river was closer than it was and thus may have reached a wrong conclusion in her own thoughts, but this is an action based on deceit, and instead of the representation alleged in the complaint that the defendants said the levee was the line, her own testimony is to the contrary.

It will be noted on page 169 of the Transcript that plaintiff said that this is the only description she ever heard of the property in her life. Since the description given by plaintiff referred only to the westerly or Feather River boundary, it is quite apparent that she did hear further descriptions, so we find plaintiff positively mistaken, to say the least, in this assertion, but we do find, nevertheless, from the sworn testimony of the plaintiff herself that there was no misrepresentation of the one line that is in question. Defendants' exhibit I is a rough map of the property, and according to plaintiff's own statement of what the defendants told her was this western boundary they described it with absolute accuracy. When he said "Along that green line to the white house" she asked him what green line he

referred to. He did not answer that it was the levee, nor did he in any part of this alleged representation use the word "levee." In answer to her question she says: "They made it more explicit and they said 'Down that fence to those trees and *across those trees*' "

In making this statement of the line defendants represented to her the exact truth, but they were even more explicit than she says and in fact their representation continued after "*across those trees*" as follows: ."*to the old Feather River and along the river to a point near the white house,* etc." That there was something said at that time about the river being the boundary and that the plaintiff then and there thought that the line went to the river is made perfectly clear by her own testimony found on the middle of page 170 of the Transcript.

Question by Macomber:

Q. Did you know what river lay behind that levee?

A. *I thought it was the Sacramento. I thought that was the same levee I had been on before.*

Thus, according to plaintiff's own testimony there was absolutely no misrepresentation as to this boundary, which is the only one in question.

It may be that plaintiff thought the river was closer than it was and that she did reach a wrong conclusion in her own thoughts as to how far *to the trees and across the trees would mean.* But the trees were beyond the levee, and she could see them. And the fact that the line went across the trees was, according to her own testi-

mony, clearly stated to her. The fact that she reached a wrong conclusion, if she did, would preclude a recovery in an action for deceit.

The allegations in the complaint that the defendants pointed out the levee as the western boundary is disproved by the plaintiff herself.

Now, bearing in mind that the plaintiff has only described the Western boundary and that she must have asked something about the other boundaries, it is quite apparent that her recollection on the subject, to say the least, is extremely indefinite and uncertain.

We would not discuss this question further if it were not for the fact that it is connected with the representation that all the land was clear and level the same as that about which they stood. On the face of the physical facts as they existed and as they were pointed out to the plaintiff, this would be so manifestly untrue that no sane man would have made the statement as plaintiff alleges it was made, nor would any sane woman have believed it if had been made. How could the land all be clear with the entire west line covered by trees?

It is, therefore, certain that if any conversation occurred from which the plaintiff might have inferred that any of the defendants represented that the land was clear and level, neither she nor they were referring to the land across the levee, is absolutely apparent from the physical facts and from the position of the parties and from the conversation that they were having.

It is, therefore, manifest that if any of the defendants used any such expression at all it

arose in the following manner, or in some similar manner, thus: After asking for the boundaries and having the defendant be more specific about the line going across to the trees and beyond the trees she turned to him and asked how many acres were in alfalfa and he said there were 250 acres, but 50 acres were drowned out when the levee broke, then she followed this up with the question: Is it all clear and level like this? and the answer would be yes. Or, possibly, after turning from the west boundary first to the alfalfa land itself and then to the back land asking about its condition she would say: Is it all clear and level like this? and the defendant may have answered yes, for while there are some swales running through the land, no contention is made that this representation was a misrepresentation in reference to that. The intent is to apply this representation to the land across the levee. We do not believe that the defendants ever represented that any of the land was clear and level, but had they done so it would have been truthful, and they are not responsible for any errors in plaintiff's conclusion, nor in any of her efforts to contort their honest statements into false representations.

Referring again to the alleged representations made to her as to the boundaries of the property, we find that John Scheiber on Page 378 testified that he clearly pointed out the lines; that they could see the timber across the levee from where they stood; that she asked him what the land out there, meaning beyond the levee, was good for, and he said it was good for wood.

She did not remember having any conversation

with him about it. She thought Morris was the one who pointed out the boundaries. As a matter of fact, Morris, in Joe's presence, pointed out the boundaries while they were down at the old barn near the levee. See Page 347:

Q. Did you tell her what the boundaries were? A. Yes.

Q. What did you tell her the boundaries were? A. I told her the boundary there along Claus Peters run, the south line from the Nicolaus Ranch, between Claus Peters and the Nicolaus Ranch run—I pointed over toward the levee, acress the levee, over to the old Feather River.

Q. The old Feather River? A. Yes.

Q. Did you mention the fact that the river was one of the boundaries of the place? A. Yes.

The next question relates to pointing out the north boundary, which the parties could not see from where they were standing, but he told her where it ran. See page 347 of the Transcript.

At the middle of Page 349 the witness testifies in answer to the question 'What was the condition of the levees in September, was grass growing on it or was it dry?'' A. No. in the fall usually the levee is pretty dry there; there is no grass growing on the levee there.

Q. All dead grass? A. All dead grass and dust on it.

Q. Was there any green land there to be seen?

A. The trees.

Q. That is over on the other side of the levee? A. Over the other side of the levee.

Q. They could be seen to extend quite a dis-

tance westerly from the levee? A. Yes.

On cross examination this witness, Morris Scheiber, stated that you could see from the road the trees across the levee and the openings in them, etc. And then in answer to the question "What did you say about the land going over the levee?" the witness answered, "I did not say 'the land going over the levee.' I said the line goes over across the levee to the old Feather River, clear over to the Feather River." (Trans. P. 359.)

Q. You told her that the land went to the river? A. Yes.

Q. Did not say that any land went across the river? Across where?

Q. Did you tell her any land went across the river? A. No, not across the river. I says "Over to the old Feather River,"

Again on Page 364, on cross examination:

"Q. You can't say now whether she understood about the river being up against the levee, or not? A. She understood perfectly. I told her that the land goes clear out to the river, over across the levee out to the old river there, and I pointed it out to her."

Again on next page:

A. Yes, I told her over across on the other side of the levee, clear over to the Feather River, the old Feather River.

It will be recalled that Morris Scheiber was talking to Miss Garwood and told her the boundaries, when his brother Joe drove Miss Garwood around the ranch in the buggy, and that this was the second time she visited the ranch and was before the signing of the contract for the sale.

On page 382 of the Transcript, Joseph Scheiber states that Morris on the occasion of the second visit told her that the boundary line ran over along Claus Peters, over across the levee, clear out to the old Feather River, that he represented the Feather River as being one of the boundaries of the place. On page 387 he tells about the wood and testifies that she asked what is the land on that side of the levee good for? and that Morris told her it was good for wood, that is the place where we got the wood. She says "Is there a market so a person can sell wood?" and I says "Yes, people come in from the plains in the fall and buy wood."

On the same page he further testified that they could see the trees from where they were in the buggy.

On page 386 Joseph Scheiber states that the first time that she came up he talked with her at the ranch house and pointed out from there the true lines.

In many places in the testimony it appears that the Scheiber Bros. told her in answer to her question as to how many acres the land contained that they never had it surveyed; that they bought it for 600 acres, more or less, and that they were selling it the same as they bought it.

It is more than reasonable to assume that the plaintiff asked them the number of acres, and their testimony that they answered that they had never had it surveyed; that they bought it for 600 acres, more or less, and were selling it as they bought it, is most convincing.

In passing, we might say that the land was

bought as 600 acres, more or less, that it did contain more than 600 acres; that in spite of Miss Garwood's claim that it was verbally represented as exactly 600 acres, the very first time that Dike prepared a written memorandum in reference to it he stated in that memorandum that it contained 600 acres, more or less. This was the receipt of September 25th. It was approved and signed by the plaintiff, and the duplicate was left with her or her agent. Hence her testimony that it was represented to contain exactly 600 acres is absurd and contrary to the overwhelming evidence and contrary to the written documents in the case. But, going back to the matter of the boundaries and clear land. Since the plaintiff herself admits that the *true lines were pointed* out to her, *that she did know that there was land across the levee; and that she did know that some of the land was covered with trees*, it is impossible for her to claim that representation, if any, that the land was clear and level, applied to the land across the levee.

She was asked by Dike in the presence of the owners of the property to go up on the levee and look at the outside land and she said "I cannot walk up a hill." (Tr. p. 207). There was no attempt to conceal anything. This certainly was sufficient to apprise her that there was land to the west of the levee.

Now let us examine the written evidence in the case and see if plaintiff has any excuse whatever for not knowing that the river was one of the boundary lines of the ranch:

Probably the first writing that plaintiff saw in

which the Feather River was referred to was the paper advertisement, Plaintiff's exhibit 5. In this circular the land is referred to as being on the east bank of Feather River.

The next writing evidently was the receipt which was given her when she made the deposit of $5000 (Tr. p. 202). In this the land is described as being on the east side of Feather River.

We then have the abstract of title in which the land is described as being on Feather River. (Defendants' Ex. K).

We also have an opinion of Mr. White on the title in which the boundary line is shown to be Feather River (Defendants' Ex. D).

We also have the contract of Sept. 27 in which the river is stated to be one of the boundaries of the ranch (Defendants' Ex. A).

We also, have the deed from the defendants to the plaintiff in which the river is again stated as forming one of the boundaries of the farm.

With all of this written evidence, together with the testimony of the three Scheiber boys and the admissions of the plaintiff herself, it would seem that it ought to be sufficient to show that there was no deceit practiced on the plaintiff as to the boundary of the ranch.

(b) THE REPRESENTATION AS TO ACREAGE IN ALFALFA:

It will be recalled that in the circular or pamphlet, which plaintiff swears was handed to her by Dike, it was stated that there were 300 acres

then and there planted to alfalfa; that plaintiff in her verified complaint and suit for rescission swore that it was represented to her that there were then and there 300 acres planted to alfalfa, and that she believed and relied on that representation (see Judgment Roll in rescission suit, Defendants' Ex. F); that in the complaint in the action at bar she swore that it was represented to her that there were 250 acres planted to alfalfa and that she believed and relied on such representation. But to our astonishment, on cross examination, in answer to the question:

Q. As yet you have not said who represented to you that there were 250 acres?

She answered:

Mr. Dike told me that there were 250 acres. The Scheibers that day that we were there, not when they were talking to me on the porch, but they told the doctor there were 250 acres but 50 acres had washed out when the levee broke.

Q. And there were 200 acres left? A. 200 acres of alfalfa left.

Q. Was that on the first day you were up there? A. Yes. (See page 209), and at the bottom of page 210 we find this testimony:

Q. Did they at that time tell the doctor and Mr. Dike in your presence that there were 250 acres originally, but that 50 acres had washed out? A. They said that 50 acres washed out when the levee broke once.

Q. They did not represent there were more than 200 acres then? A. No, I understood there was only 200 acres when I bought it. Dike told

me that before I bought.

Just before the last quotation on the same page following up questions along the same lines this question was asked:

Q. How did the conversation come up? A. I don't know, I was not listening. They were not talking to me, etc.

When asked further on page 212 if she did not swear in this Court and in this complaint that it was represented to her that there were 300 acres of alfalfa she answered: "First they said there was 300 acres altogether—Dike said; then afterwards he said there were 250 and 50 acres had been washed out.

Q. You knew that when you swore to the complaint, when you testified on direct examination? A. *I can't remember all of those little things that they told me.*" (The rest of the answer which related to Steude was stricken out).

Turning to page 170 of her testimony we find where she said when asked which way they went back on that first trip: "A. I could not tell you which way we went. I was talking and not paying any attention. *I was not interested in the land at the time at all.*"

It will be seen from this testimony that while the plaintiff in her rescission suit swore that it was falsely represented to her that there were 300 acres planted to alfalfa and that she believed and relied upon such representations, and while in her complaint in this case she swore that it was represented to her that there were 250 acres in alfalfa and that she believed and relied

upon such representations, we find her admitting in unequivocal language that she knew from several sources before she bought the land that there were only 200 acres planted to alfalfa. We find further that the allegations in her verified complaint alleging that certain boundaries were pointed out to her were admittedly untrue. In other words, she swore that the west boundary was the levee. She admitted, under oath, *that they pointed out the green line and said that the line went beyond the green line of trees.* She admitted that *later and prior to the commencement of the suit* she *actually discovered* that there was a large quantity of land beyond the levee and beyond the trees and yet she comes into Court with a sworn complaint swearing under oath that the defendants pointed out to her the *levee* as the west boundary.

Now, let us see what is her excuse for thus trifling not only with her oath, but with the property rights of these defendants and with the dignity of the Court.

We find the excuse on page 207:

Q. When they pointed out the boundaries, they told you "that green line over there," and they pointed in the direction of the levee? A. In the direction of the levee.

Q. And the green line was trees beyond the levee? *A. I took it that they were trees on the slope of the levee, the same as I had seen the day before, going down the river.*

In other words, her various sworn allegations about the misrepresentations are shown to be and admitted to be absolutely false, and known to her

to be false before she commenced the suit. Yet, her only excuse is that she was mistaken at the time that the boundaries were pointed out.

Again, in the same connection we find that Mr. Dike tried to show her the land across the levee. The defendants had nothing to conceal. They had a tract of land that was worth $75,000 to anybody and they were selling it on its merits. The land across the levee they considered of little value and never had considered it of any particular value, but they were willing that everybody should see what there was, and in good faith they were showing and telling them everything.

Turning to page 207 of the testimony we find that Miss Garwood testified that Dike asked her to go up on the levee and look around the country. She was asked this question: "Q. Mr. Dike, are you sure he used the words 'around the country?' A. In the first place, I didn't understand his question altogether, it was simply, '*Would you like to take a walk up and look around.*' That is what it amounted to, and I said 'No, I want to see the farm,' and I said '*My ankle is too sore, I could not walk up a hill.*' "

In the face of the fact that no one tried to conceal anything from her; that she was invited to look at the land over the levee; that she was told that the line went over beyond the trees across the levee, she says that they represented to her that there were 600 acres of all clear level land, and she testifies that she said to them "You have told me all the good things about the place, now tell me the bad things," and they said that it was all good clear level land. Each of the defendants deny that they ever made any such misrepresen-

tations, or any misrepresentations, and in view of the fact that the land was not clear; that she knew it was not all level, and in view of the things that Joseph Scheiber did tell her about the land, such a statement by her is absurd and not worthy of credit. (For the purpose of this portion of our brief we are not discussing the fact that Dr. Ramos carefully examined the entire property and that she is fully bound by all that he saw and was told.)

Now, what did Joseph Scheiber tell her about the land? He told her the correct boundaries (See page 382). He told her about the land across the levee and that it was used for wood purposes (See page 383). Mr. Dike asked her, in his presence, to go up on the levee and look at the land on the other side (see page 383). Morris told her in his presence that the land contained 600 acres, more or less (see page 382); that the witness did not tell her that it contained 600 acres of the finest alfalfa land; that he did not tell her that it contained 300 acres of the finest alfalfa land in California; that no one told her this in his presence; that he did tell her about the land being subject to overflow, and said he told her the lower land "when the back water came up real high goes under water—all the lower land—lower part of the land when the river breaks above, then the water come over the land too, over the alfalfa," and that that was the first time she was up there. Their object in taking the buggy ride was "to show her the lines and everything what a man ought to show her;" that he did not tell her anything about the place that was untrue (see page 386). That no one else in his presence ever said anything to her about the

place that was untrue; that she could see the back land from the house; that the boundaries were pointed out each of the two times she was up there before the contract was made (see page 386); that at Mr. White's office was said nothing to the effect that she was buying 600 acres of the finest alfalfa land in California.

On cross examination he said she was told about the land outside of the levee; that the correct lines were pointed out to her; that he told her the back land overflowed (see page 388;) that he told her these things because he wanted to tell her the truth (see page 388). Again on page 396 he testified that he did not want her to misunderstand anything; that he told her the back land was used for pasture; that he did not tell her the back land was just as good alfalfa; that he told her it was not as good as the front land. On page 397 he testified that he never considered that the land west of the levee was of any particular value except for wood; that that was about all, except that they sometimes turned their stock over here.

That the boundaries of the ranch were correctly pointed out to plaintiff by Mr. Dike, one of her witnesses, is shown by his testimony at page 260:

"Q. If you went to the ranch with Miss Garwood and Mr. Ramos before any contract of purchase was entered into between Miss Garwood and the Scheibers, which parts of the ranch did you go over, if any, and how did you go over it? A. We drove around the road and through the fields in an automobile and then we walked over parts of it; parts which they wanted to examine more carefully.

"Q. If you went to the ranch with Miss Garwood and Mr. Ramos, did you point out the boundary of same? A. Yes.

"Q. If you went to the ranch with Miss Garwood and Mr. Ramos, state why you went, how many times you went, who was with you, the object of the visit or visits, and what was said, if anything, to Miss Garwood about the boundaries of the ranch, the acreage contained therein or the acreage planted to any particular produ[illegible]

"A. We went for the purpose of selling the property to her, a number of times, at least three or four times, with Miss Garwood, Mr. Ramos and the chauffeur. The object of the visits was to examine the ranch and satisfy them of its qualities and desirability as a dairy ranch. About the boundaries, we drove along the line of the property where the roads followed the line and walked over to the line in places where it left the road, and also pointed the boundary line by fences, levee and river boundary. We stated the acreage to be six hundred acres, three hundred acres planted to alfalfa and the balance pasture land, parts of which was adapted to alfalfa."

Morris Scheiber testifies (page 347) about pointing out the lines. On page 348 he says she asked about the back land overflowing and that he told her that it was overflowed * * * when the water came up "real high it backs up into the lower places there in the back field—it comes up quite a ways into the ranch;" that Miss Garwood never said to him "You have told me all the good things about the ranch" and to tell her some of the bad things about the ranch; that she never

used any such language there; that the levee was dry and not green grass on it at the time (page 349); that the green trees were on the other side of the levee and could be seen to extend quite a distance westerly from the levee; that he had not told Miss Garwood that the levees on the ranch were all complete and that she would not have any assessments to pay; that he told nothing about getting $5000 back; that he made no untruthful representations to her concerning the property; that he answered all her questions truthfully (page 350); that in Mr. Dike's office he told her the land contained 600 acres, more or less; that they never had it surveyed and that was the way they were selling it; that he never placed a price per acre on the land; that Miss Garwood and Dr. Ramos tried to get the property for less than $75,000 and Dr. Ramos also wanted them to reduce the price; that they told them why they would not take any less for it (page 351). On pages 351 and 352 witness recounts a clever answer that he gave to the Doctor when the Doctor tried to get him to throw in the hay that had been grown on the ranch that spring.

On page 353 he tells about what occurred at the office of Mr. White, and that Mr. White was not interrupted and that Miss Garwood did not make any statement about buying 600 acres of the finest alfalfa land in the State. At page 355 he states that he never heard about any commissions having been paid Dr. Ramos until long after the Deed was made, and signed. At page 356 he tells of the man who tried to buy the place after they had signed the contract with Miss Garwood. On page 364 he says that Miss Garwood understood

his description; that he told her the land went clear over to the old river and he pointed it out to her; that he did not tell her how much land was out there, *and that she did not ask.* On Page 367 he testifies that she was up at the ranch twice before the contract was signed, as does also every other witness in the case, who was asked about the matter.

John Scheiber testifies that she was up there three times before the Deed was made out (page 375); that nobody in his presence told her that there were 600 acres of alfalfa land, or that it was all clear, level land, or that there were 600 acres in the place; that they never saw the circular or pamphlet marked "Exhibit 5" (see page 376; that they did not tell her the land was not subject to overflow; that they did not tell her it was all sub-irrigated; that everybody told her the truth about the place that he heard speak about it; that she was at the ranch twice before the contract was signed (see page 377); that Morris was not at the ranch the first day that she came up; that she asked the first day how much alfalfa they had; about the line (page 378); that he told her there was timber over across the levee and she could see it; that she asked what the land out there was good for; that he told it was good for wood (page 379); that he said that the land went clear over to the river; that he does not remember whether he told her the land out there was subject to overflow or not; that he never told her that the land was free from overflow; that he does not remember about ever talking about the land overflowing.

In the face of this testimony, and in the face of

the facts, plaintiff's allegation that it was represented that the land contained 600 acres and was all clear, level land, and that there were 250 acres then planted to alfalfa is contradicted by the conditions she saw; by the facts as they were and by all the witnesses. Hence these representations not only *are not proved by clear and decisive testimony,* but are overwhelmingly disproved.

(c) In the foregoing discussion we have covered the allegations of the original complaint down to the visit to Mr. White's office. While counsel left the allegations of the complaint concerning the wrongdoing on the part of Mr. White in rather an uncertain state by reason of not attempting to prove them, still a word or two of comment upon the allegation might be considered appropriate. He testified that Miss Garwood may have asked him about the expression "more or less," if so, he explained it as he would explain it to anybody—that there might be more and there might be less than 600 acres. See page 159 of Transcript.

When asked if Miss Garwood at any time said to him that it was her understanding that she was to get 600 acres of the finest alfalfa land in the State of California, he answered that he could not recall that she used any expression of the kind; that she spoke enthusiastically about the place, and that he had a faint recollection that she asked his opinion of the place, and he said that he told her that he did not know—that it was in a good neighborhood, and that alfalfa land was a good thing in California. See p. 160 of Transcript.

Turning now to Miss Garwood's testimony:

She says that in the midst of the reading of the contract she stopped Mr. White with the statemen that she had never agreed to buy 600 acres, more or less, etc. (see page 184 of Transcript); that Mr. White very deliberately stood up, turned his back put a book on the shelf and said " 'Miss Garwood, it means 600 acres, that is only a law term' *and I signed it.*"

The plaintiff, evidently, is very seriously confused over this matter, as she is over all the other matters involved. In the first place, she may have asked him when he reached the reading of the number of acres which are mentioned on the first page of the contract what the words "more or less" meant, and he may have said that it was a law term, but if so, he said, as he testified, that it meant that there might be more than 600 acres, or there might be less than 600 acres. And when the reading of the contract was finished she probably said that she thought she was getting a good bargain and that she was buying some fine alfalfa land. As they were then ready to sign the contract Mr. White may have picked up a book from the desk and put it on the shelf, making room for signing the contract, at the same time explaining to her that he did not know anything about the land, but that it was in a good neighborhood and that alfalfa was a good crop in California—all of which would be natural and reasonable.

But Miss Garwood says when she interrupted him in the very beginning of the contract, that "*he deliberately stood up, turned his back,* put a

book on the shelf and said, 'Miss Garwood, it means 600 acres, that is only a law term' and I signed it." These last words show clearly that she did say something to him *at the time they* were ready to sign the contract, at which time the removal of the book was a natural thing to do. Miss Garwood's explanation of her remembrance of the occurrence is so absurd and unreasonable and Mr. White's testimony so consistent with what would be natural and likely under the circumstances that it seems quite certain that the plaintiff has thought so much over her case that she is quite confused as to what was said by anyone in the premises. Besides, the representations which plaintiff seeks to imply by this conversation have been disproved by overwhelming testimony and by admitted facts.

In connection with the suggestion which plaintiff throws so frequently into the case that it was represented to her that she was buying 600 acres of the finest alfalfa land in the State, we might say that it would be so easy for plaintiff to get this impression from most innocent remarks of the various parties. She claims she got the impression that there were exactly 600 acres of land in the place—but there were more. She claims she got the impression that there were 300 acres, growing five or six crops of alfalfa to the year, whereas she was told there were only 200 acres. She may have asked in this connection, Is land that produces that many crops a year considered good alfalfa land? And the answer, undoubtedly, would be: The finest in the State. So, in a dozen different ways in speaking with the parties about the alfalfa, they having in mind the 200

acres in alfalfa, and she having the whole ranch in mind, she might have reached the erroneous conclusion that their answer referred to the whole ranch. What the parties did, undoubtedly, say to her was that it was one of the best dairy farms in the State of California, and they may, even, have said that it grew as fine alfalfa as any land in the State of California, both of which representations were absolutely true, but nobody ever told her or intended her to believe that the whole ranch was the finest alfalfa land in the State of California.

Taking into consideration the fact that the Scheiber brothers testified that she visited the property; the fact that they told her the back land was subject to overflow; that it had been used as pasturage, and made the other explanation that they made in reference to the West boundary and to the back land and truthfully answered all her inquiries; the fact that her personal inspection disclosed facts diametrically opposed to the representations she alleges, it is clear that she had not proven her allegations by clear and decisive proof.

(d) Coming now to the allegations of the amended complaint to the effect that it was represented to her that this land was all sub-irrigated land. We desire to make these comments:

From the plaintiff's own testimony we find:

FIRST: That at the time she was viewing this property she was paying little or no attention to what was said about it.

SECONDLY: That she was not familiar with alfalfa lands, or with any land for that matter.

THIRDLY: That the trifling matter of whether there were 300 acres or 250 acres, or only 200 acres in alfalfa was, according to her testimony, a matter of no consequence to her; and

FOURTHLY: When her attention was specifically called to her various and varying sworn allegations in reference to alleged representations as to there being 300 and then 250 acres in alfalfa, when, in fact, she was positively told before she made the allegations that there were only 200 acres in alfalfa, the fact that she said *I can't remember all those little things they told me''* shows how impossible it is to rely on her statements.

Now, taking all these matters into consideration, what attention did plaintiff pay to any statement about the land being sub-irrigated, and what influence does this Court suppose the alleged statement about sub-irrigation if made had on her when she did not pay any attention to a little thing like the difference between swearing that it was represented to her that there were 300 acrs in alfalfa, when she was positively told that there were only 200 acres.

There seems little doubt that, if the word sub-irrigated was used at all, it was used wholly in reference to the 200 acres that were in alfalfa, and it would have been the most natural thing in the world for one, or more of the parties, in speaking of the alfalfa growing on the place to say that it was sub-irrigated, but there is no doubt that no one intended or tried to convey to her the impression that the whole ranch was sub-irrigated. In the first place, the defendants told

her nothing of the kind. In the second place, Mr. Dike had no authority to make such a representation. In the third place, he did not make such a representation, and in the fourth place, it would have been a mere opinion if he made it. In the fifth place, if Mr. Dike did actually make the representation that she claims he made the first day about the ranch; if he did hand her the circular that she says he did, then when she viewed the ranch and was told and saw the conditions as they existed, she was not in a position where she could rely any further on any representations made by Mr. Dike, because she knew from what she saw and heard, and, for that matter, from Mr. Dike's own admissions that his statements were not to be relied upon. We will later cite authorities substantiating this and the other points that we make.

Further this trade for this land was made directly with the defendants. The Colonization Company was never authorized to do anything other than to find a purchaser. No authority was ever given it or any of its officers to bind the defendants. The contract of sale was signed by the defendants. The plaintiff made her inquiries and investigations with the defendants who were the proper parties to give her information, and each of these defendants deny emphatically that they ever told plaintiff that the land was sub-irrigated.

II.

The question whether or not the representations made were false, necessarly has been combined to a greater or less extent with the question as to what representations were actually made.

From all the testimony in the case; from the explanations that were given to Miss Garwood personally by the defendants—and there is no doubt that she made full inquiries in reference to the property, though she hides behind the statement that she was not paying any attention—it is clear that no misrepresentations whatsoever were made to her, but that on the contrary the facts and the true facts in reference to the property were fully and fairly stated to her by all the parties. It is therefore, plain that she has failed to establish by either clear or decisive evidence:

I. That the defendants made the representations she claims were made.

II. That the representations actually made were false.

And both of these failures are fatal to a recovery in this action.

III.

The next question is whether or not the representations which were made by the defendants were not actually believed by them on reasonable grounds to be true.

Assuming that Mr. Dike, or any of the other so-called agents, made any representations which were untrue, and which the plaintiff was entitled to rely upon, as representations of fact, and which she did rely upon, *the question is did these agents have reasonable ground to believe these things to be true, or if not, were these representations merely opinions?* And, finally, the question arises *whether or not the agents had any authority to make any representations.*

We might, even, add that the alleged agents for the defendants became plaintiff's own agents in the transaction and took up her side of the case in an endeavor to secure the land for less than the price asked by the defendants, after the plaintiff had agreed in writing to buy at that price, provided the agents could not get the land for her for less. Thus, she made them her own agents.

Discussing these matters in order we have:

1. Did the agents make any representations of fact which they did not have reasonable grounds to believe to be true? We do not think they did. There is nothing to show that they did though the plaintiff may have reached a wrong conclusion from the things which they stated. But did she prove that they did not have reasonable grounds to believe they were true?

Assume that the agents did assert that the land was *all* first class alfalfa land; that it was all sub-irrigated; that 300 acres or 250 acres were then in alfalfa and that the balance not then planted could be planted to alfalfa; that the land was protected from overflow by levees; that it was all known as river bottom land and was what is known as sub-irrigated land; that without irrigation alfalfa could be raised upon said land to such an extent as to yield five to six cuttings of alfalfa every year, it is quite plain that the agents may have had reasonable grounds to believe that these statements were true, unless an inspection of the premises readily showed them to be false. And if we assume that plaintiff has proven the allegations of her complaint and amended complaint through representations made

by the alleged agents of the defendants then *she has not proven in any way that the agents knew or had good reason to know their statements to be false.* On the contrary, according to the plaintiff, she would have us believe that her own inspection of the premises did not disclose that these representations were false. We are satisfied from the case as a whole and from all the facts before the Court that the alleged agents never made the representations claimed by plaintiff to the extent or in the manner stated by her.

They may have said, referring to the alfalfa land, that it was first class alfalfa land; that a part of the land was used for pasturage, but that it was clear and level and was suitable for the raising of alfalfa; that it was protected from overflow by a levee; that it was river bottom land; that it was sub-irrigated land and would grow alfalfa without irrigation, but all these matters were substantially true and the agents believed them to be true. Besides, practically all of them, if not all, were mere matters of opinion.

We will clearly show in this connection that the plaintiff had no right to rely upon these representations, if they were made, and that she did not rely thereon. And finally that the agents had no authority to make any representations.

2. It is quite the custom for agents to make boosting remarks in reference to property they have for sale and everybody expects them to be made, and the Courts have frequently held that such things are permissible. Hence people do not place, and are not permitted to place, any great reliance on an agent's boosting talk, par-

ticularly when he is a total stranger, but usually investigate for themselves.

As to examples of the things that are held to be mere matters of opinion, we cite the following California cases, and it is with the law of California, or the law as laid down by the Supreme Court of the United States in California cases that we have to do.

"There is nothing in the circumstances that the defendant expressed a somewhat favorable opinion of his wool, and he indulged an opinion that, while Mr. Conn's wool might be a little finer than his own, his was fully as profitable as Conn's for manufacturing purposes. This was mere praise of his own property—the simplex commendation which is allowable in making a trade, and is not held, by the rule of the common law, to amount to a warranty."

Byrne v. *Jansen,* 50 Cal. page 627.

"It is apparent to us that the matters alleged as constituting the fraud were matters of opinion rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Ione Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits; and the other matters alleged may well be classed under the head of matters of opinion rather than a false representation of facts. There is no averment which excludes the idea of personal inspection by the purchased."

Rendell vs. *Scott,* 70 Cal, 515.

"All that the evidence tended to show in that regard was in substance, that Unruh, who was

the agent of one Baldwin in subdividing and disposing of some lands of the latter in Los Angeles county, with accompanying water privileges, and who was familiar with the requirements for the successful cultivation of oranges, represented to defendant, who was ignorant of the value or character of the land, that he ought to take a piece of the land and put it in oranges; 'that it was good orange land; would raise oranges,' and make defendant a living; that it 'was first class ground,' 'decomposed granite' or 'gravel' and 'free from frost.' To sum it up in defendant's own language: 'He said it was fine orange land, and I could put out oranges and go east in the summer and come back and I would get a crop of oranges; and on the strength of that statement I purchased the land,'

"It is quite obvious that such statements made by a seller of land, even admittedly to induce a purchase, cannot be made the predicate of false or fraudelent representations such as will avoid a contract of sale. They are the exaggerated, and it may be the reckless, declarations of an eager trader, holding out the golden promise of profit to induce a sale; but after all they are but the expressions of a vender's opinion, actual or pretended, upon which the purchaser will rely at his peril. As said in *Rendell* v. *Scott,* 70 Cal. 514.

" 'It is apparent to us that the matters alleged as constituting the fraud were matters of opinion rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Ione Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits; and the other matters alleged may well be classed under the head of matters of opinion rather than a false representation of facts. There is no averment which ex-

cludes the idea of personal inspection by the purchaser.' "

Lee v. *McClelland,* 120 Cal. Page 149.

" 'The assertion of that which is not true,' which is thus made actual fraud, must be of some fact not warranted by the information of the person making it, and cannot be held to include an opinion of the person, however erroneous such opinion may be, or with what degree of positiveness it may be asserted. The statement of Neville to the deceased was not the assertion of any fact, but was merely the expression of his opinion as to the effect produced upon the first will by the execution of the subsequent one."

Estate of *Johnson,* 134 Cal. Page 663.

" In *Johnson* v. *Johnson* 134 Cal. 662, (66 Pac. 847) it is said: 'An assertion of that which is not true in order to constitute a fraudulent representation cannot be held to include the opinion of the person however erroneous it may be or however positively stated.' (See, also *Lee* v. *McClelland,* 120 Cal. 147, (52 Pac. 300); *Lloyd* v. *Kehl,* 132 Cal. 107, (64 Pac. 125); *Colton* v. *Stanford,* 82 Cal. 398, (16 Am. St. Rep. 137, 23 Pac. 16); Oppenheimer v. Clunie, 142 Cal. 317, (75 Pac. 899)."

Henry v. *Continental Building, Etc.* 156 Cal. 675.

"An assertion of something not true must be of a fact not warranted by the information of the person making the assertion in order to be a fraudulent representation, and not merely the opinion of such person, *however positively asserted.*"

Winkler v. *Jerrue,* 129 Pac. Rep. P. 804.

"Representations as to what a ranch will produce in the future are not representations of ex-

isting facts, but are merely speculative surmises, and are not ground for rescission of any exchange of lands."

Bickel v. *Munger, et al.,* 129 Pac. Rep. 958.

From these authorities it is clear that the alleged statements of the alleged agents that this land was first class alfalfa land; that 250 acres were then planted in alfalfa; that the remainder could be planted in alfalfa; that it was protected from overflow; that it was river bottom land and that it was sub-irrigated were mere matters of opinion. But if made, they were true. It is a fact that such representations might not have been true as to every acre in the ranch, but they were true about the ranch. And if the agents did assert that all the ranch was of exactly this same character then that was a mere *boosting assertion* of an agent upon which a *purchaser does not have the right to rely.* ..However, the evidence in this case is mose persuasive that the representation that *all* the ranch was uniformly of the character suggested above was not made by the alleged agent. Nor did the plaintiff rely upon any representations of the agents. She investigated for herself, and proof shows conclusively that she knew that the land beyond the levee was not in this condition, and we have shown positively by the testimony of the three defendants that *she was informed of the actual facts* in reference to the remainder of the land.

3. Did the agents have authority to make any representations whatsoever? The plaintiff knew that Dike was only an agent and she was bound to inquire into the extent of his agency. The facts are uncontradicted that Dike telephoned to

the Scheiber boys and asked whether the place was still for sale and that they said they would sell it for $75,000 provided the purchaser took the personal property, also, and that they would pay a commission on the purchase price of the real property. They were, therefore, mere middle-men without authority to make representations and the plaintiff was bound to ascertain to her peril what authority they had.

Since the agents were expressly authorized to sell this property for the sum of $75,000, no more and no less, the position occupied by Dike and his associates was that of mere middle-man. And they come squarely within the rule laid down in the case of

King v. *Reed,* 24 Cal. App. 229, 141 Pac. 41. wherein the District Court of Appeals of this District held that:

"A middle-man is a broker whose duties are limited to finding and procuring a purchaser ready, able and willing to accept his client's terms, or to effect a transaction with his client on any terms satisfactory to both; that the term middle-man is merely descriptive of the nature of the employment. And the agent is in no fiduciary relation to his principal, nor under any obligations not to receive compensation from the opposite party to the transaction."

King vs. *Reed,* 24 Cal. App. 235.

An agent authorized merely to sell real estate has no power to bind his principal by representations as to the value, quality or quantity.

National Iron Armor Co. v. *Bruner,* 19 New Jersey, Equity, 331;

Samson v. *Beale,* 27 Wash. 557, (68 Pac. 180)

Iowa R. Land Co. v. *Fehring,* 101 Northwestern 120 (Iowa);

Lake v. *Tyre,* 90 Virginia, 719;

Kennedy vs. *McK.,* 43 New Jersey Law, 288;

Cooley on Torts, 487.

In the case of *Samson* v. *Beale, supra,* a purchaser of realty sued for damages for a sum expended in completing a foundation under the building, alleging the vendor's agents falsely represented that there was a complete and sufficient foundation. He knew that the agents had authority to collect rents, pay taxes, and look after ordinary repairs, and to receive offers for sale, but could not complete even the terms of a sale without submission to the owners. The agents told him the name of the contractor who put in the foundation, and showed him plans alleged to be those of the contractor, but which in fact were old and abandoned plans accidentally left in the agent's hands. Held, that a motion for a nonsuit should have been granted, as plaintiff should have consulted the contractor or owners, and was not justified in relying on the agent's statements.

Samson v. *Beale,* 68 Pac. Rep. 180.

The same rule is stated in slightly different language in this State in the early case of

Mudgett v. *Day,* 12 Cal. 139-140,

wherein the Supreme Court of this State said:

"Day having been apprised that Humphries was only holding the note for collection and as the agent of Mudgett, as is clearly indicated by the

agreement, was bound to inquire into the extent of his agency. He was bound to ascertain whether he had any right to make such an agreement as that set up in the defense. *There was no proof that he had.*"

This is the same rule laid down in

31 Cyc. Page 1322, Note 66.

and many cases cited in Note on following Page 1323.

The rule is again laid down clearly in this State in the case of

Davis vs. *Trachsler,* 3 Cal. App. 554-559, (86 Pac. 610-612).

The question involved was the authority of a real estate agent and the obligations of third parties dealing with him to ascertain his authority. We quote from this case as follows:

"There is no testimony tending to show the instrument by which Hopkins was appointed was recorded. But it was known by appellant that he was holding himself out to be the agent of Davis. The receipt and contract of May 24th, 1897, was signed *as agent.* The appellant having *actual notice of the agency,* it was incumbent *on him* to ascertain the scope of authority possessed by Hopkins * * * * * An agent can only bind his principal when he acts within the scope of his authority."

Davis v. *Trachsler,* 3 Cal. App. 559.

The rule that an agent authorized merely to find a purchaser cannot make representations as to quality, quantity or value is inferentially affirmed by our Supreme Court in the case of

Henry vs. *Continental Bldg., Etc.,* 156 Cal. 667,

where in the Supreme Court of this State held:

"Local agents were without authority to make and conclude terms with prospective investors and borrowers * * * * * * * *

If as appellant contends, there be a finding that the local agent of the defendant made false representations to the plaintiffs by which they were induced to sign the note and mortgage, the same may be disregarded as immaterial, and, therefore, altogether insufficient of itself to support the judgment."

Henry vs. *Continental Bldg. Etc.,* 156 Cal. 674.

It, therefore, is clear that the agents had no power to make any representations; that plaintiff has been wholly unable to prove any untruthful representations made by the defendants.

VI.

Were the alleged representations made with the intent that they shold be acted upon?

Assuming then that the defendants and their agents made representations of material facts; that such representations were false; that they were not actually believed by the defendants or by the agents on reasonable grounds to be true, we now come to the next proposition which plaintiff must clearly establish or fail, namely:

That the false representations were made with the intent that they should be acted on. Plaintiff admits that after making the statements to her which the alleged agents made in reference to the

property and which statements she claims were false, *they invited her and her agent to view the property* and proceeded to take them to the property and to show them over it and even invited plaintiff to go upon the levee where she could have seen clearly the conditions of which she now complains so bitterly.

And, not only did they *invite the plaintiff to carefully inspect the premises, but they took her agent and confidential advisor over the entire premises and showed him everything.* It is therefore clear that if the alleged representations *were made* as plaintiff claims and were *false,* still it must be clear, and it is clear, *that they did not intend that these statements should be acted upon, but invited the plaintiff and her agent to inspect the premises and all thereof, and to see the facts for themselves.*

It is, therefore, clear that plaintiff has wholly failed to prove this fourth essential element in her cause of action.

The next element in her cause of action which plaintiff must establish by clear and decisive proof is:

That such representations were acted on by plaintiff and in so acting on them she was ignorant of their falsity and reasonably believed them to be true.

Here plaintiff strikes another fatal bar to her cause of action for damages for fraudulent misrepresentations.

Referring to the complaint in the suit for rescission duly verified by plaintiff and referring

also to the original complaint in the case at bar, prepared by different attorneys and under different circumstances and after careful consultation with their client, we find stated very clearly the things upon which plaintiff claims she relied in making the purchase.

Now, surely, at those early dates after the purchase, the plaintiff should have known what she did rely upon in the purchase of the property and here comes the remarkable fact that in neither of these complaints did plaintiff claim that she relied upon, or had ever heard of the representations set forth in the amendment to her complaint verified June 23rd, 1915, and filed thereafter, wherein, for the *first time* she makes the contention that it was represented to her that the propery was what is known as *sub-irrigated land* and that it was *all protected from overflow by levees* and that it would *all produce from five to six crops of alfalfa per year.*

Now, if the plaintiff has relied upon the allegations that the land was all protected from overflow by levees, why did she not set this forth as one of the representations upon which she relied? She testifies that in the Spring of 1912 she learned that the back land was subject to overflow, *and yet it is not until 1915 that she claims that the land was represented to her as not being subject to overflow.* Again, if it was represented to her that the land was all sub-irrigated and *she relied upon this representation,* why did she wait until 1915 to state that such a representation was made and that *she had relied on it in making the purchase.*

In connection with the various complaints, we desire to call attention to the fact that in the suit for rescission she alleged that it was falsely represented to her that the land was *not in a reclamation district,* and *that that was one* of the things upon which she relied. She did not repeat this allegation in the present case and the *evidence* shows that *before she closed the deal she knew that the land was in a Reclamation District.*

In fact, before she closed the deal, that is before she paid for the property, *she was advised that the reclamation district would return to her $5000 because of the fact that she had her levee constructed.* She swears that this was told her the first day she was on the property, but the evidence is to the contrary. We cite this reference to the Reclamation District simply to show that plaintiff has at all times been reckless in her statements about the representations which were made to her, and the things upon which she did rely. And at this point we call the attention of the Court to the well known rule of law of this State:

"That a witness false in one part of his testimony is to be distrusted in others."

C. C. P. Sec. 2061.

There are other fatal defects in plaintiff's alleged reliance upon the alleged fraudulent representations and these fatal defects are as follows:

1. That if the representations were made by the agents that *all the land* was of the character alleged, then her viewing the premises and her agents viewing the premises disclose the fact, according to her own admission, that there was land

across the levee that *was not protected by levees* and that was *not clear*. Therefore, if the agents had represented that *all the land* was of uniform character then when she thus found that one material statement was untrue, she had no right to rely upon any of their alleged representations.

Again, she claims it was represented that there were *300* acres in alfalfa and yet she admits that subsequently she was positively told there were only *200 acres*. This knowledge destroyed her right to rely upon any representations of the agents.

We will first cite the case of

Perkins vs. *Center,* 35 Cal. 713-725.

Where in it was held on page 725 of the decision that a certain fact learned by the plaintiff *"was sufficient to put her upon inquiry."* Again, that a certain other fact *"was of itself sufficient to awaken inquiry and put her upon her guard."*

And this rule was forcefully reiterated in one of the latest decisions of our District Court of Appeals, in a case of alleged misrepresentations, where the parties had, as in this case, the means of knowledge at hand, and *where, having learned that one material matter had been misrepresented to them, they were bound to make a full and complete investigation of all the facts.*

The case referred to is:

Gratz v. Schuler, 25 Cal. App. 117-120-121-122, (142 Pacific 899).

The Court after (page 120) stating the var-

ious elements which plaintiff must prove in order to prevail, on page 121 stated the general rule as follows:

"If one party to a contract is justified in relying and *does in fact rely* upon *false representations,* his right of action for rescission or for *damages for deceit* is not destroyed *merely because he did not avail himself of the means of knowledge immediately at hand as to the truth or falsity of the representations. Ruhl v. Mott,* 120 Cal, 668, (53 Pac. 304); *Neher* v. *Hansen,* 12 Cal. App. 370, (107 Pac. 565); *Tarke* v. *Bingham,* 123 Cal. 163, (55 Pac. 759); *Willey* v. *Clemments,* 146 Cal. 91, (79 Pac. 850; *but if he does avail himself of an opportunity to test the truth of the representations made, and thereby discovers prior to the consummation of the contract that such representations were false, he will not be heard to say that he was deceived by them. We take it that this proposition needs no authority to support it.*"

The Court then continues:

"*Ordinarily, perhaps, this might not be so; but having ascertained that the defendants falsely represented one material matter in the transaction, this was notice that the defendants may have been false in all else that they said; and therefore it was incumbent upon the plaintiff thereafter to make full investigation as to the truth or falsity of every other material representation. This is so, because the law does not undertake the care of persons who, with notice of a fraud and the means of prevention at hand, will not take care of themselves. Ruhl* v. *Mott,* 120 Cal. 668, (53 Pac. 304); *Bacon* v. *Soule,* 19 Cal. App. 428, (126 Pac. 384).

Gratz v. *Schuler,* 25 Cal. App. 121-122, (142 Pac. 899 et seq.)

This case alone is conclusive of the case at bar, for her admissians that she knew the facts which showed that the land was not all clear and level and did not contain 300 acres of alfalfa, and was not all protected by levees, made in incumbent upon her, thereafter to make a full investigation as to the truth or falsity of every other material representation.

Gratz v. *Schuler,* 25 Cal. App. 122, Supra.

And where it is shown as in this case that a person is given ample opportunity for investigating for himself, he cannot afterwards say he relied upon the statements of others. It is his business to inquire into and ascertain what the facts are. In this case, plaintiff admits that she was inattentive and careless, when the defendants themselves were explaining the conditions of the ranch, and pointing out the facts to her and Dr. Ramos.

She cannot now be heard to complain that she did not learn the facts.

"A Court of Equity will not undertake, *any more than a court of law* to relieve a party from the consequences of his own inattention and carelessness."

Slaughter v. *Gerson,* 80 U. S. (13 Wall) 379-(20 L. 3d. 627).

2. *The plaintiff did not rely on the alleged representations of the agents. She viewed the premises and she inquired of the defendants for the facts. Her agent viewed the premises and inquired of the defendants the facts.*

The defendants told her the truth and the full

truth and the evidence is overwhelming to that effect. Hence she has utterly failed to make out a case under any theory of it. But she did not rely upon the alleged statements of the alleged agents. Her viewing the premises proves this and precludes a recovery.

Thus in the case of

Calton v. *Stanford,* 82 Cal. 351,

The Court, on page 398, said:

"A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. *The greatest liberty of making contracts is essential to the business interests of the country. In general, the parties must look out for themselves.*"

In the case of

Wainscott v. *Occidental, Etc. Ass'n,* 98 Cal. 253,

The Court, on page 257, said:

"The second position taken by appellant is that no matter what representations are made in reference to the *character and value* of property by a vendor if *the purchaser visit the property itself,* it being land, prior to the sale, and makes a personal examination of it touching those representations, he will be presumed to rely, not upon the representations, but upon his own judgment in making the purchase. *Farrar* v. *Churchill,* 135 U. S. 609, sustains the proposition contended for, but in the same connection it is proper to say that this rule must be taken subject to the proviso that the vendor does nothing to prevent his investigation from *being as full as he chooses. Southern Development Co.* v. *Silva,* 125 U. S. 259.

There was nothing done in this case to prevent the plaintiff and her agent from making her investigations as *full as she chose.* On the contrary they were offered every opportunity to make investigations and were given full information and possession of all the facts about which they inquired.

In the case of

Oppenheimer v. *Clunie,* 142 Cal. 313,

the Supreme Court of the State of California sets forth quite fully the law of this State in reference to actions based on false representations, and on page 319 says:

"The rule is thus stated by Pomeroy in his work on *Equity Jurisprudence* (sec 893): 'If after a *representation of fact, however positive,* the party to whom it is made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue.' "

After considering this branch of the rule we will then note what follows and continue the quotation:

"The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficent opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice required that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot

claim that he did not learn the truth, and that he was misled.''

Again on page 321 the Court quotes from *Commissioners* v. *Younger,* 29 Cal. 177, as follows:

''A court of equity will not relieve a party from a contract on account of misrepresentation, when no confidential relation exists between the parties, and, where the means and sources of knowledge being equally accessible, and open to both, the party complaining has no right to place reliance upon the statement of the other; *for the law aids the vigilant not the idle, and will not undertake the care of persons who will not, with the means at hand, take care of themselves.''*

The law governing ordinary cases is clearly stated in a case cited by counsel for plaintiff, to-wit: in the case of

Barron Estate Co. v. *Woodruff Co.,* 163 Cal 561,

where on page 575 the Court said:

''If, therefore, in point of law, it was the duty of plaintiff to have exacted the representation of these plans, specifications and estimates, its failure so to do would be a *display of a lack of ordinary care and prudence,* while, upon the other hand, if these plans and specifications and estimates had been demanded and were not forthcoming, there would be notice of trickery upon the part of the defendants and of a failure to live up to their written agreement. *Unquestionably, then, if plaintiff was derelict and culpable in these matters, the inevitable results would be either a waiver of the fraud or estoppel by conduct from charging upon it.''*

In that case the Court held, however, that the very parties who made the misrepresentations in

reference to the contract became *by the very contract itself the confidential and trusted agents and advisors of the plaintiff and by virtue of this agency and relation of trust and confidence it became the high duty of the defendants to make full disclosure of all the knowledge which they possessed.*

Thus distinguishing that particular case from the rule which applied to the case at bar and leaving the plaintiff in this case either fully informed, as the evidence clearly shows that she was, or stranded high and dry on the bar of her own inattention and carelessness.

"In the absence of a confidential relation, the defendants were under no obligation to volunteer information to the plaintiff which was as readily accessible to him as it was to the defendants, and as 'the law will not undertake the care of persons, who will not, with the means at hand, take care of themselves,' the mere silence of the defendants cannot be construed to be a fraudulent concealment sufficient to support an action for fraud." (citing many cases).

Bacon v. *Soule,* 19 Cal. App. 428-439, (126 Pac. 384.

In this respect the District Court of Appeals of this State in the case of

De Laval Dairy Supply Co. v. *Steadman,* 6 Cal. App. 651-655 (92 Pac. 877)

on page 655 said:

"It is a general principle that if the means of knowledge be at hand and equally available to both parties alike, and there be no fiduciary relations, the injured party must show that he has availed himself of the means of information existing at

the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other."

Quoting from *Slaughter* v. *Gerson,* 80 U. S. (13 Wall) 379 (20 L. Ed. 627) the Court said at the bottom of page 655 of the California Appellate Report:

"A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand equally available to both parties, and the subject of purchase is alike open to their inspection if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes.. he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by over-confidence in the statements of another." (citing authorities).

Finally, the Supreme Court of this State in the case of

Moxon-Nowlin Co. v. *Norswing,* 166 Cal. 509, on page 511 states clearly the rule in these cases.

This was an action to recover damages for alleged fraudulent misrepresentations in connection with the transfer of property. And the court found among other things that the plaintiff did not believe the alleged representations, that it did not enter into contract relying upon their truth, and, further, that it is not true that the plaintiff did not know until long after the deliv-

ery of the deeds that the lands conveyed by defendants to the plaintiff were of dimensions less than those represented. On the contrary, it was found that before any contract was entered into or deed made the defendant delivered to the plaintiff *or its representatives* a map showing the correct measurements of the property.

In the case at bar the defendants, according to plaintiff's own admission pointed out to her that the line went across the levee to the green trees and beyond the green trees to the river. While plaintiff does not actually say to the river, and her own admission that she thought it was the Sacramento River shows that she knew that the line went to the river.

Again, in the same case (166 Cal. 511) the court states the things necessary for a plaintiff to show before she can recover in an action for deceit and winds up with the statement that she must show that the alleged representations *actually did mislead and deceive.* Or, in other words, were relied upon by the party complaining.

The above authorities clearly establish the rule *so frequently laid down in this State that where a party instead of relying upon representations does make an investigation he is charged with all of the facts which by attention and diligence he could thus have learned and the further rule that where it is learned by the plaintiff that any fact has been misrepresented to him it is his duty to investigate all the facts.*

These two rules clearly distinguish the case of

Eichelberger v. Mills Land, Etc., Co. 9 Cal. App. 628, (100 Pac. 117)

and other cases of a kindred nature relied upon or to be relied upon, by plaintiff. Thus in the case last mentioned (9 Cal. App. 628) it will be found that the rule is clearly laid down on page 636:

"In the *absence of an inquiry instituted by plaintiffs* for the purpose of ascertaining the dimensions of the land, and in the absence of knowledge as to the true dimensions, both of which facts appear from the findings, plaintiffs were warranted in relying upon the representations in that regard made to them by the seller * * * * * *'The mere existence of opportunity for examination or of sources of information is not sufficient.'* "

In other words, the rule is clearly and plainly stated that if misrepresentations are made upon which a person is asked *to rely and he does rely upon them* and *they are the facts upon which he is reasonably entitled to rely, then since he did rely and did not make any investigations, the party who induced him to so rely is bound by his misrepresentations so far as they are representations of facts upon which the party is entitled to base an action for deceit,* and that when a party *does so rely* and *does not institute inquiries* the *mere existence of opportunities* for examination or for information is not a bar.

On page 637 the Court says:

"We are unable to find anything in connection therewith *calculated to arouse suspicion on the part of plaintiffs as to the falsity of defendant's representations.*"

The Court then proceeds to cite those cases wherein the parties actually did rely upon false representations and made no personal investiga-

tion, and therefore the court held the *mere opportunity* or *existence of opportunities for investigation* do not bar them.

These are the only exceptions to the authorities which we have cited, and the authorities cited by us are conclusive of the law in this State and the facts in this case come squarely within them and not within the exceptions.

THE DUAL AGENCY OF THE COLONIZATION CO.

We make the further point in this connection that the California Colonization Company became, as they had a right to become in this case, the agents of the plaintiff herself in this very transaction. In other words, they were authorized to find a purchaser for $75,000 and no less. She agreed with them that she would pay $75,000 for the property if they could not obtain it for less. And she actually placed in their hands a $5000 check to secure her agreement *to take it for that sum if they could not obtain it for less.* She thus made them her agents to represent her in the transaction of the business. With them she had agreed to pay the price and had deposited her money to secure the agreement, but they were not to communicate this fact to the defendants and have the bargain closed as clearly appears from the receipt itself, but were to withhold this information and endeavor with her, and they did endeavor with her and her agent, to beat the defendants down in their price. They, therefore, in this case (where they had a right to, because there were no confidential relations existing between them and the defendants for they

were mere middle-men) actually represent the plaintiff. In other words, they became agents for both parties.

In fact, and by way of parenthesis we might state that it is our firm belief under the law that so far as Miss Garwood was concerned they were her agents in the first place.

When she approached them they had no contract on the property, but, after talking with her and hearing her express a desire to obtain a tract of land such as they described this to be to her, they at her request phoned to the defendants and obtained permission to find a purchaser for the property for $75,000. The fact that they were to be paid their commissions by the defendants, would not change the rule at all. Thus, it has been held that even though a mortgageor pays the fees for preparing mortgages, etc., the attorney is frequently held to be the agent for both parties to the transaction. However, there is no question that the agents in this case became her agents afer she had agreed to buy at defendants' price and had made her $5000 deposit. Under the circumstances, their knowledge of the facts became her knowledge, and if there was any information which they had about the property or facts of which they had reasonable notice it was their duty to disclose them to her and the law makes all their knowledge her knowledge and estops her from denying notice and knowledge. If they had committed any fraud in the transaction as they were her agents their fraud was her fraud and became her fraud by the relationship she assumed.

She knew they were middle-men, or in a limited sense agents of the defendants, and when she consented that they act for her too, then she is estopped from denying that their notice and knowledge was not her notice and knowledge.

See:

2 Corpus Juris, 872;

Pine Mt. Etc. Co. v. *Bailey,* 94 Fed. 258;

In Re Manufacturers Sales Co. 209 Fed. 629.

In the case last cited on page 654 the Court says:

"A principal who knows that his agent is also acting as agent for the party adversely interested in a transaction with him and yet consents that he may act as his agent is estopped from denying the notice and knowledge which the agent has during the transaction."

There are many other cases to the same effect.

In *94 Fed. 260 Supra,* the Court cites:

Fitzsimmons v. *Express Co.* 40 Ga. 330-336.

(This case is also found in the 2nd American Reports, page 577).

There it was held that the agent of an express company became the agent of the consignee because he, at the request of the consignee, undertook to safely keep the package sent for a short period after he received it. During this time the package was lost. While he was the agent of the Express Company in the transaction, the court held that he became the agent of the other party and the company was exonerated from liability.

Finally we find the plaintiff relying upon several things other than the representations of the alleged agents.

1. *She relied upon the inspection of the premises* and her inquiries of the defendants, both of which inspection and inquiries, disclosed the facts that if the agents made the representations she claimed, the most material of those represenations were wholly untrue. Therefore, she did not rely upon these representations and if she tried to, the law would not permit to do so.

2. We find that *what she did rely upon was the representations made by Mr. Brown and the others in connection with him, that if she would purchase the property, put on it more stock and permit him to run it according to his ideas, she would make a good profit.* And, also, according to the representations made by him, and possibly by Dike, that the property could be subdivided and sold in the year 1915 at a good profit. Nobody would question the facts that such representations, if made, were wholly matters of opinion. They applied wholly to the future and to changed conditions and were opinions as to what might be done in the future. No one can rely upon these things and if he does rely upon them he cannot recover.

These are the things upon which plaintiff actually relied. It will be recalled that Mr. Brown told her that he considered this one of the best dairy farms in the State of California, and so did everybody else, and so it is. It was from such representations as these that the plaintiff has now built up the superstructure of the alleged

misrepresentations upon which she is now trying to convince the Court that she did rely.

3. *The plaintiff did not rely upon any representations.* She did make an investigation for herself though in a most careless, inattentive and indifferent sort of a way and she was told the truth about the property fully and fairly by the defendants. They knew that it was worth every cent that they were asking for it, and if the court could have seen their demeanor on the stand, the court would quickly realize that they were simple minded honest industrious men, and believed in fair dealings in every way.

What plaintiff did rely upon particularly was her agent Dr. Ramos, and she had him make a careful specific, minute and exact investigation of the entire transaction. *This, of course, is absolutely conclusive of the case at bar, unless the plaintiff can avoid this conclusive bar by the attempt to show an alleged bribing of her agent.*

The fact that plaintiff has been deliberately false in the statement of material facts from the beginning to the end of this transaction, of course, renders her testimony of no value, but being more charitable in the matter than the facts will warrant let us assume that she has forgotten from time to time the details of the transaction and is obsessed only with the thought that she has through her mismanagers been unable to make as great a profit as she expected and that, therefore, she must have been cheated. Hence, every possible thing that she can think of, or that she thought of during the time of the negotiations or that Brown can now suggest to her has been twist-

ed or contorted into misrepresentations of fact, or as circumstances which it is hoped might enable her to obtain a judgment for damages in this case.

Surely in that class must be placed the effort to represent to this Court that Dr. Ramos *was bribed.* If this Court could have seen the demeanor, the manner and the almost conclusive indications of fairness, honesty and square dealings disclosed by Mr. Crane when he was on the stand, it would have seen at a glance that Mr. Crane who is the one who actually agreed to the division of the commission with Dr. Ramos, would not be a party to any fraud or any attempt to do that which was not honorable and right.

And let us see what the facts were:

The plaintiff testified that she had frequently requested the California Colonization Company to divide the commissions and that they had refused to do so; that she had made this request to them personally, and that they had refused it.

Now, if it should be apparent to the court that before the Colonization Company agreed to divide the commission, she had actually decided to buy the property, then the subsequent agreement to divide commissions with her agent would not in any manner influence her, nor him, because she had already decided. Again, if the agents, pursuant to her repeated demands and strictly in accordance therewith, innocently acceded to her demands and agreed to divide the commissions, assuming that her agent would report the truth to her about it, surely there was no fraud in the transaction in any manner, shape or form, so far

as the defendants or the defendants' agents were concerned. If Dr. Ramos became subsequently faithless to Miss Garwood that is no concern of ours. Though, we could not for a moment reach the conclusion under the facts of this case that the plaintiff was ignorant of the fact that Dr. Ramos was to get half of the commission.

Going back to the proposition that she had already decided to buy before the Colonization Company agreed to divide the commission, we find this clearly proven and an indisputed fact in the case.

Let us take, for instance, the testimony of Charles Weinrich, found on page 336 of the Transcript. In substance he says that in the month of September, 1911, he heard a conversation between Dr. Ramos and Miss Garwood on "K" Street in front of the Turner Hall. That he was walking immediately behind them and knew them. Miss Garwood spoke about buying the place. Dr. Ramos said Dike should pay him a commission, and she answered "Make him do it, my dear, make him do it." That he went around to the office and reported these facts to Mr. Crane. Mr. Crane says at the bottom of page 89 that Miss Garwood had *several times asked him to split the commissions prior to the time that he agreed to do so,* and (page 109) that prior to the time he agreed to split the commissions Charles Weinrich informed him that this demand was going to be made.

Then we find, turning to the top of page 109, a statement of the circumstances under which the agreement was made to split the commissions. Mr. Crane says that Dr. Ramos came out of the

office where he (Ramos) was talking with Miss Garwood and told Crane that they had decided to take the ranch provided they would split the commissions, otherwise they would not take it. So he and Mr. Dike held a meeting of the corporation and voted to do so. Again on page 115, the witness says that Dr. Ramos came to him from the little office where he was conversing with Miss Garwood and said that they would not take the property unless the commissions were divided; that they held a meeting and passed a resolution authorizing a division of the net commissions; that they wrote it on a card and gave it to Dr. Ramos, and that they never tried to conceal the division of the commission.

And this is repeated in another form when he said "We made out a check for Dr. Ramos as the agent of Miss Garwood," but that he could not remember just when the check was made out. Later it appears from the testimony that the money was not paid until after November 1st. On page 116, the witness says *that his impression was that Miss Garwood knew all about it.* At any rate, the fact is that the agreement made for the division of the commission was just what Miss Garwood herself had demanded and which she admittedly sent her agent to demand at the time she deposited the $5000.

While Mr. Crane's recollection was somewhat uncertain as to the time of payment to Dr. Ramos, yet it is certain therefrom that the agreement to pay the commissions came after Miss Garwood had decided to take the property. Her message to Crane by Ramos was that they had decided to take it provided the commissions were divided.

Turning to Miss Garwood's testimony on pages 176 and 177 of the transcript we find at the bottom of page 216: "On *Monday morning* when he said he would not take off the grain, then I said 'Won't you divide your commission with me because I really can't spend so much money' but he said no, he never divided commissions with anybody, he could not do that—"

Q. Did you ever at any time tell Dr. Ramos to exert himself to get them to cut it down?

A. *I used to say to give me that money,* get them to give it to me, because he said he thought it would be a good purchase, he thought the land would be valuable, and I said "You get them to take off half the commission, because I must have something."

Just what plaintiff meant by the statement "I used to say 'give me that money' " is not quite clear. We have our own impression as to her coming very near stating the truth in this expression, because she undoubtedly did try to get the commissions out of Dr. Ramos afterwards, but whether with success or not, we do not know. That is her own affair, however. But returning to the part of her statement which she did make clear, we find her telling the Doctor to get them to take off half of the commissions, and then adding: *that a settlement was made* and that after the settlement the Doctor said she ought to be ashamed of herself for taking so much time, etc. This was all on Monday morning, September 25th, 1911.

Thus we see that she expressly authorized and directed Dr. Ramos to make a final demand for

these commissions which he did and which were then acceded to and in the settlement which followed she paid $5000 down and obtained a receipt. She claims that she did *not know that the agents had complied with her demand and had agreed to divide the commissions* and claims that Ramos concealed the fact from her later. An analysis of the testimony shows that she carefully refrained from saying that Dr. Ramos reported to her at the time of making the deposit that they would *not agree to do so.* At any rate and as a part of the same transaction when she directed this demand to be made by Ramos, she put up $5000 and accepted and countersigned the receipt therefor.

Two things are clear from these facts:

1. That she had made up her mind to purchase the property *before the agents agreed to divide any commissions.*

2. *That the agreement of Dike and Crane to pay a share of the commissions was at her request and on her express demand and, therefore, by every rule and principle of law no fraud or damage of any kind could be predicated on their compliance with her demand.*

Frankly, we believe that plaintiff knew all about the agreement to divide the commissions, but this is so immaterial that we do not care to discuss it, except to say in this connection, however, that it appears that the commissions were not actually paid until after the sale was completed on November 1st. We find that in October Miss Garwood was told by Mr. Brown that Dr. Ramos *had actually received the commissions,* and that she

then demanded the commissions of the Doctor, but that he denied that *he had been paid the commissions.* As a matter of fact, Ramos had not *received* the commissions and if the alleged conversation occurred, he truthfully denied that he had received them. We do not believe that he then said or intimated, or that she questioned the fact which she surely well knew that there had been an agreement to pay one-half of the commission. *The fact in dispute,* (if there were any disputes) was whether or *not he had then received the commissions.* And he had not, and if asked about it, he undoubtedly told her so and became indignant about the inference that *he had been paid.*

Whether or not after the sale was completed and he did get the commissions he declined to pay them to her and concluded that he had actually earned them by his services in investigating the matter for the plaintiff, as he clearly had, and, therefore, refused to give them up is something with which we have no concern, nor has the Court.

Our Civil Code says: "He who consents to act is not wronged by it." Sec. 3515.

Surely this rule can be reduced sufficiently to include: "He whose demand is complied with, cannot claim that he was injured by such compliance."

At pages 181 and 182 of the transcript the plaintiff states that she was informed by Mr. Brown in October that Dr. Ramos had received a part of the commissions for the sale of the land. That was prior to the execution and delivery of the deed. The plaintiff seems to have become quite indignant concerning this charge against

her agent and she wired the doctor to come to her and he came and at once denied that he had recived any commissions. This is all the investigation she made. She had been informed several times that the Doctor had been paid a commission but she did not deem it of sufficient importance to make any inquiry of Dike, or Crane, or the defendants, each of whom she saw several times before the sale was completed. She was content to take the Doctor's word.

To us there seems that there is nothing to plaintiff's case, for she has failed to establish any one of the essential elements which the law *says must in a case of this kind be established by clear and convincing testimony.*

VI.

The final element to be so established by plaintiff is that she acted on the alleged false representations to her damage.

The proof is overwhelming that the property could have been sold at the time of this contract in the open market for the full price paid; that between the time of signing the contract and the deed the defendants were offered the same price by another party (see Trans. page 356) and that within two or three months after the purchase Mr. Charles F. Silva, who was ready, able and willing to do so, offered to buy the property from plaintiff for the full amount paid by her. If the plaintiff may not have been able to handle the property to advantage subsequently is no one's fault.

The testimony that the property was worth the

full amount she paid for it, and was worth that at the date of trial in spite of the depressed condition of the realty market is overwhelming. So far as the witnesses in this respect are concerned we not only have a preponderance in number, but also our testimony is that of the most reliable people in the neighborhood as well as of those best informed. The court will, of course, bear in mind the testimony that all land varies to a greater or lesser extent, but the point to be determined is what would the land have sold for at the time, allowing a reasonable time to find a purchaser, *and the fact that two parties besides the plaintiff were ready and willing to purchase for the full amount; that the defendants had the opportunity to sell to one and the plaintiff to another is surely quite persuasive of what the property would have sold for in the open market.* The plaintiff did not attempt to prove that the land was not worth $75,000, until after we had closed our case. The only evidence in the case, therefore, is the testimony of our witnesses because it was a part of plaintiff's case to prove her damages.

Now let us see what occurred:

After we had completed our case, the plaintiff, against our protest and objection most strenuously urged and without asking the leave of the Court, or even hinting that leave to re-open the case was desired, (the testimony being taken before a Commissioner) attempted to prove values by certain witnesses. We wish to make this comment on their testimony:

Mr. Redfield owns an adjoining piece, partly within and partly without the levee, similar to

that of the plaintiff. He testified to values of land in the neighborhood, making the values ridiculously low. Thereupon (see page 417 of the transcript) the witness was asked if he would take $350 per acre for his land and he refused to do so. He was actually offered $350 per acre and there was present in the courtroom those who were ready, able and willing to pay him that price and who expressly authorized us to make the offer.

So in Mulvany's case. On page 430 we find that Mr. Mulvany, who had a ranch similar in character to the Garwood property was offered by Mr. Hewitt *$250* per acre for it just as it stood and asked if he would take it. He refused to take it unless Hewitt would also take the 300 acres on Coon Creek, but Hewitt said he was speaking of his home ranch, which was similar in character to the Garwood property and on the river. Mulvany answered that he would not sell his home place for *$250 per acre.*

The reliability of these two witnesses as to value when they are placing a value on somebody else's property of $125 per acre, and in one case declining to take $250 an acre and in the other case $350 per acre for property similarly situated should be quite conclusive, it seems to us.

On this point and in order to show that plaintiff was not damaged to any extent we quote the valuation placed upon this ranch as a whole by the witnesses of defendants, all of whom were and have been for many years familiar with the land and competent to testify as the its market value. These witnesses placed the value as follows:

John Borgman—Tr. p. 323.....$80,000
Benjamin Drescher—Tr. p. 320..... 80,000
Chas. Silva—Tr. p. 286..... 75,000
J. B. Thompson—Tr. p. 328..... 80,000
G. A. Wessing—Tr. p. 307..... 80,000
Arnold Zimmerman—Tr. p. 330.....85,000

It certainly appears from the above testimony as contained in the record that the trial court was justified in concluding that plaintiff had not been damaged by the transaction.

VII.

The final question in the case is plaintiff's election to rescind and the fact that she is bound by that election.

An examination of the notice of rescission (Tr. p. 49) will disclose the fact that plaintiff therein gave no reasons why she wished to rescind. She did not therein mention or hint that any misrepresentations of any kind had ever been made to her by anybody nor did she give any indications of her ground for rescission until she commenced her suit for rescission. Plaintiff attempts to claim that as the defendants refused to consent to rescinding they are bound by alleged misrepresentations of the agents and herein they confuse express agency with implied agency, express authority with implied authority and notice of alleged misrepresentations with no notice thereof and contracts actually made by agents with contracts made by the principals themselves, and say that because the defendants refused to consent to the rescission that they are bound by all the alleged misrepresentations made by their alleged agents because they accepted the fruits of the transaction.

We have already shown the fact that the alleged agents were middlemen or limited agents merely; and that they did not make the bargain, but that plaintiff and defendants made their own bargain; that the defendants are not bound by any misrepresentations of agents, even if misrepresentations were made————————and that the defendants in this case are not bound for the various and sundry reasons hereinbefore stated.

Besides ratification can only be made after knowledge. For the purpose of the argument passing the point that the contracts having been reduced to writing the defendants are entitled to rely upon the presumption, at least so far as representations of agents are concerned, that the writing included all of the representations and passing for the purpose of argument also the point that the agents had no authority to make any representation, we find here a contract made by the parties themselves and not by the agents, and we further find the well established rule in this State that a ratification can only be made in the manner that would have been necessary to confer an original authority or where oral authority would suffice, by accepting or retaining the benefits of the act with notice thereof. Civil Code Section 2310.

In this case in order to authorize the agents to make contracts and representations in reference thereto their authority is required by the Code, Section 1624 Civil Code, to be in writing. Since their only authority was to find a purchaser and not to make a contract and since the parties made their own contract, the rules contended for by plaintiff do not apply.

In this case, even if the authority could have been conferred verbally, it could only have been ratified after knowledge of the circumstance and acquaintance with the unauthorized acts to be ratified.

"It is a well settled rule that a principal who ratifies the acts of his agent must be made acquainted with the character of those acts and *unless all the circumstances are made known to him the ratification is void.*"

Billings v. *Morrow,* 7 Cal. 171, 174, 175.

"In order to constitute a subsequent ratification of the act by the principal it seems that there must be evidence of previous knowledge on the part of the principal *of all the material facts.*"

Puget Sound L. Co. vs. *Krug,* 89 Cal. 237-243,

See also:

Maze v. *Gordon,* 96 Cal. 61, 65,
where the Court said:

"I do not think the evidence shows ratification. It is not made to appear that when the letters were written to plaintiff, Hamilton was sufficiently aware of the terms of the sale to enable him to ratify it. The letters show that he knew of a sale and since he was willing to ratify one might infer that he must have known of the particular conditions of the sale. But this is not enough. Before ratification can be *inferred such knowledge must be shown.*"

In the case of

Galinsky v. *Allison,* 114 Cal, 458, 460,

the court holds:

"*The principal determines for himself what authority he will confer upon his agent* and there can be no implication from this authorizing a sale

of his lands that he intends that his agent may, at his discretion, charge him with the responsibility and duties of a mortgageor."

In the case at bar by authorizing the agents to find a purchaser, the defendants did not authorize the agents in any way to make *any warranties, either of quality or quantity or any other warranties.* The defendants made their own bargain and if the plaintiff was relying upon any warranty or representations of the alleged agents it was for her to so advise the principals.

ELECTION TO RESCIND

Returning again to the subject at hand, namely: election to rescind. We find the situation is that the plaintiff is barred by her election to rescind and the reason therefor is as follows:

When she gave her notice of rescission no change had been made in the condition of affairs. When she brought her suit for rescission no change had been made which precluded a rescission. Then we have this fact that at the time she gave her notice of rescission and commenced her suit to rescind the *only thing that stood in the way of a rescission was her proof of the alleged fraudulent misrepresentations.*

If, therefore, she has in this case proven that she was defrauded, then she could have made the same proof in the rescission suit. That being so, *her election to rescind,* confirmed by the *commencement of the suit,* is a *final binding election which she cannot change.*

The fact that she subsequently and before the trial of that case voluntarily changed conditions

by disposing of some of the personal property cannot effect her election in the premises, but simply defeats the only remedy which was then open to her.

The matter of the rescission of the real property is not necessarily connected with the rescission of the sale of the personal property, but if it were as we alleged in our answer of the rescission suit, *it was her fault and her act occurring subsequently to the commencement of that suit,* which barred her remedy, for the disposal of a part of the personal property was her voluntary act; and if that prevented her from obtaining rescission, it was her own fault.

The general rule that an election is conclusive is stated in

15 Cyc. 259, as follows:

"By preponderance of authority the mere commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain the same, is such a decisive act as to constitute a conclusive election, barring the subsequent prosecution of inconsistent remedial rights."

"An election once made with knowledge of the facts between coexisting remedial rights which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election."

15 Cyc. page 262.

In our own State our Supreme Court has said:

"When two inconsistent remedies are open to a person he must elect which *he will pursue, and having elected one he is barred from the other.*"

Parke, Etc. Co. v. *White River L. Co.,* 101 Cal. 37.

"It is true that a party having inconsistent remedies may not pursue both, *but must choose between them, and having clearly elected to proceed upon one will be debarred from invoking the other.*"

Hines v. *Ward,* 121 Cal. 115-120.

The court further says that to some extent the doctrine of election proceeds upon a like theory of equitable estoppel, that the inconsistent attitude of a party will put his adversary to some disadvantage. And after citing the following United States decision we will return to the last mentioned suggestion:

In the case of

Shappirio v. *Goldberg,* 192 U. S. 248,

the Supreme Court of the United States said:

"When a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged, by the rescission of the contract. If he chose the latter remedy, he must act promptly, 'announce his purpose and adhere to it' " * * * * * * * * *

The real question involved in the election of remedies, however, is this:

Was the remedy open to the plaintiff when she selected it and began her suit? In this case it was.

Returning to the proposition as suggested in

Hines vs. Ward, Supra,

that the election of remedies will depend to some extent on whether or not the defendant will suffer to his disadvantage from the change of position, we call attention to the fact of the differences in damages allowed plaintiff in rescission and the damages allowed in a case of this character, to-wit: Action for Deceit.

In a suit for rescission the plaintiff, if successful, is entitled to have the transaction set aside; to return the property she bought, and to get her money back, together with incidental damages for loss of time, etc. The parties are then placed in *statu quo.*

In this action for deceit, the contention of the plaintiff is that if any acre of that land is not worth $125 she is entitled to the difference between what each acre is worth and the $125, and that it does not matter if the whole ranch is worth the $75,000; that it would not matter if 250 acres of the ranch were worth $75,000, and that she was getting all that value; that she could keep that value and still make the defendants pay the difference between nothing and $125 in some instances and $50—$60 or $70, or $80 an acre and $125 in other instances.

Thus, according to the plaintiff's theory of the case, she is entitled to retain this *ranch worth $75,000* and make the defendants pay her for 150 acres of land at the rate of $125 per acre and also for 200 acres at the rate of $45 per acre—about $30,000 in all.

In the action for rescission all that she would have been entitled to in reference to these same matters would have been to return the ranch worth $75,000 and get her $75,000 back.

While, according to her theory in this case she is entitled to retain the ranch worth $75,000 and get $30,000 besides. Is there a difference? Would defendants suffer by the changes in the remedies? Had the ranch been returned to the defendants they could have sold it for $75,000 and would they have been out anything? They could have sold it and they would not have been out anything in the transaction. If plaintiff keeps the ranch and makes them pay $30,000 then she gets their $75,000 ranch for $45,000. Are the remedies inconsistent?

As to the matter of damages, we cite the case of

Sigafus v. *Porter,* 179 U. S. 116-123,

on the measure of damages, and we could cite authorities from all over the United States to the same effect, but that is a California case decided by the United States Supreme Court and we submit that to establish the rule.

The measure of damages in an action for deceit in the sale of property is not the difference between the value of the property as it proved to be and as it would have been if as represented, but is the difference between the real value of the property at the date of sale and the price paid, with interest thereon, together with such outlays as were legitimately attributable to defendant's conduct, since the damages are limited to the direct pecuniary loss, if any, of the plaintiff, *and will not cover the expected fruits of an unrealized speculation.*

Sigafus v. *Porter,* 179 U. S. 116.

SALE EN MASSE.

Inasmuch as counsel for plaintiff asserts so strenuously that the sale of this property was by the acre instead of as a whole, let us examine the evidence to see if the trial court was not justified in concluding as it must have concluded, that the sale was made of the ranch in gross.

On page 99 of Transcript, Brown, a witness for plaintiff in answer to a question whether the sale was in gross, replied, "it was to be sold as a total, providing they took the stock." Subsequently he stated that the contract was for 600 acres at $125 per acre but he is referring to the option which had expired, and not to any matter connected with the sale to plaintiff. Speaking of the contract with Miss Garwood he states at page 102 of Transcript: "I would not swear whether the contract said so much an acre or $75,000."

Mr. Crane, a witness for plaintiff, states at page 105 of the Transcript that he cannot swear that the land was put up to plaintiff by the acre.

Mr. Dike, a witness for plaintiff, states at page 261 of the Transcript that the ranch was sold as a whole.

The purchase price was given by the Scheibers to Mr. Dike as $75,000 and not $125 per acre. No price by the acre was mentioned.

The above named witnesses were all the witnesses examined at the trial concerning the question of whether the ranch was sold by the acre or in gross with the exception of the plaintiff and she is the only one who testified that it was sold by the acre.

The documentary evidence in the case shows that it was sold as a whole. The circular (Plaintiff's Ex. 5) gives the price as $75,000 for the whole ranch, no price per acre being mentioned.

The receipt given to plaintiff by the Colonization Company (Defendants' Ex. B) places the price at $75,000, no price per acre being stated.

The contract of Sept. 27 (Defendants' Ex. A) gives the price as $75,000, nothing whatever being said about a price per acre.

In addition to this convincing testimony on this point, we desire to call the attention of the Court to the fact that in all the pleadings recited by the plaintiff in which she sought a reduction in the purchase price she did not ask to have the price per acre reduced. She sought to have the price of the ranch as a whole reduced.

Now, just a word further about the quantity of land in the tract. Counsel for plaintiff has sought to make it appear that a part of the ranch had been washed away and that a part lay in the old channel of Feather River. The evidence does not show any such condition. Counsel must base his conclusions on the survey made by Mr. H. H. Jones and the map made by him (Plaintiff's Ex. 2) which was so inaccurate that he did not refer to it in his brief.

In order that the Court may have a clear picture of the ranch as it existed at the time of the sale, we will call attention to the map made by Von Geldern (Defendants' Ex. I). The boundary throughout is marked by a broad line. The old levee lies directly to the west of the county road

and the new levee extends farther to the west and along the river until it reaches the "cut-off," and then along the east side of the "cut-off." This new levee was not constructed at the time of the sale. The artificial channel or "cut-off," which has been constructed since the ranch was sold, extends across the narrow portion of the place where the words "proposed channel" are written. The length of this artificial channel across the ranch is short, but by referring to the map marked "Defendants' Ex. J" the Court will observe that it extends across other lands to the south of plaintiff's. The old channel of Feather River is shown on both maps.

Mr. Jones testified that within the exterior boundaries of the ranch there were 535 acres and that there were 73.8 acres lying between the old and new levees, as they existed when he made the survey in April, 1915 (Trans. p. 86). The artificial channel at that date had been completed and the new levee extended along the east side of it where it is marked "new levee" on the map.

On cross examination it developed that he did not survey the exterior boundaries of the ranch. At page 87 of the Transcript he stated: "I did not make any survey of the land lying west of the present artificial channel of Feather River." He gave as his reason that the water in the river at that time was high. By comparison the Court will find that the land on the west of the artificial channel which Jones did not survey contains about the same acreage as that between the old and new levees. Adding this omitted acreage to what he stated was east of the new levee and we have more than 600 acres in the ranch.

In July, 1915, Von Geldern surveyed the ranch, including the land lying west of the artificial channel, and found that the acreage was 609.9 acres. At that time the land lying between the two levees had an elevation of 14 feet, and the land lying between the old channel and the artificial cut had an elevation of 12 feet above the old river channel. From this survey it does not appear that the land had been washed away as stated by the witness Mulvany; but it does appear that there was not a shortage in acreage as contended by plaintiff and that the trial court was jusified in concluding that there had been no misrepresentation as to acreage.

A WRITTEN CONTRACT SUPERCEDES ALL PRIOR NEGOTIATIONS.

The contract was in writing and it is a question what representations, if any, contrary to the terms therof that plaintiff can rely upon. This is, in effect a warranty that the property is of a certain character. Our Supreme Court has frequently held that a contract having been reduced to writing any evidence of any warranty being contained therein can be presented.

Johnson v. *Powers,* 65 Cal. 179-181;

Kullman Sals Co. v. *Sugar, Etc. Co.* 153 Cal. 731-32-33.

In both of these cases it is held that a warranty cannot be shown by parol and that when a contract has once been reduced to writing the parties are presumed to have put in the contract every material term, representation or agreement upon which they rely.

THE MEANING FOR THE WORDS "MORE OR LESS."

The Supreme Court of this State in the

29 Cal. page 178-179,

clearly states the law as Mr. White stated it, in reference to the words "about" or "more or less" or equivocal language in a Deed as follows:

" 'containing about seventy-two acres,' or any equivalent language in a deed is mere matter of description, and of but little if any account for that purpose even, and always gives way to courses and distances, which in turn give place to metes and bounds. Hence, where land is sold by metes and bounds, concluding with a statement of the number of acres, a mistake as to the number of acres affords no ground of action by either party against the other, unless it be made to appear, beyond controversy, by clear and positive testimony, that quantity constituted one of the principal conditions of the contract, and did not operate merely as an inducement to the purchase. *Marvin* v. *Bennett,* 26 Wend. 169; 8 Paige, 312. The expressions used in such cases 'about so many acres,' or 'so many acres, more or less,' being openly indeterminate and uncertain show that they are not of the essence of the contract, and that reliance, so far as quantity is concerned is placed entirely upon the description by metes and bounds; so if it should, upon an after computation turn out that there is a greater or less number of acres than stated, there can be no recovery for the excess or deficiency, as the case may be, especially where, as in the present case, the complaining party has had every opportunity, by the exercise of ordinary vigilance, of guarding against any mistake in that respect. *Marvin* v *Bennett, supra; Northrop* v. *Sumner,* 27 Barb. 196; *The Morris Canal Company* v. *Emmet,* 9 Paige, 168.

"But even assuming that it did amount to such a misrepresentation on the part of the defendant as to the quantity embraced within the boundaries given by him as would, under some circumstances, entitled the plaintiffs to relief in a Court of equity, we think that such circumstances are entirely absent from this case and that any loss or injury sustained by them is to be attributed to their own negligence and *Laches.* They had the means of ascertaining the true quantity at hand, either by an inspection of the surveys and maps in their possession, or by visiting and inspecting the premises themselves which were in the immediate vicinity and as accessible to them as to the defendant. They not only did not resort to either of those sources of information, but they did not even take the precaution of asking the defendant as to his accuracy of his estimate of the quantity. Having thus failed to exercise even the most ordinary care and diligence, a Court of equity will not listen to their complaint. *1 Story's Eq. Juris.,* Sec. 200)."

Board of Commissioners vs. *Younger,* 29 Cal. 178-179.

EXCEPTIONS TO EVIDENCE.

The plaintiff noted five exceptions to the ruling of the court on the admission of evidence during the trial of the case, and the ruling of the court being against her she assigns such rulings as errors on this appeal.

The first, *Number Three,* is found at page 286 of the Transcript where the witness Silva was asked the market value of the land as a whole on Nov. 1, 1911, the date of the deed to plaintiff. This certainly was a proper question and the court did not commit error in permitting it to be answered. Plaintiff bought the ranch as a whole

and if it was worth what she gave for it she was not damaged.

The same may be said of exception *Four,* page 286, and exception *Seven,* page 307.

Exception *Number Six,* page 303, was made to the introduction in evidence of a warrant for $5,106.43, dated Dec. 30, 1911, issued by Reclamation District No. 1001 to Isabelle Garwood.

Plaintiff claimed in her direct examination that she did not know that the land was in a Reclamation District. The abstract of title delivered to her indicated this fact. She also testified that she was to get $5000 back because the levee was constructed. This warrant was offered in evidence to show that she did get the $5000 back and that the ranch actually cost her $5,106.43 less than the purchase price named in the contract. The court certainly committed no error in permitting this warrant to be introduced in evidence.

Exception *Number Five,* found at page 302 of the Transcript, was taken to the admission in evidence of a certified copy of the Judgment Roll in the action of Isabelle Garwood against L. M. Curtis et al. The reason for the introduction of this document was stated to the trial court at the time that it was introduced (Tr. p. 302). Plaintiff testified that she did not get 600 acres of land, yet by her verified complaint she quiets title to the tract which she purchased from defendans, consisting of 609.9 acres, the description of the tract being the same as contained in her deed from the defendants, and also by courses and distances, the latter being an improved description.

Surely the trial court in view of the contention and testimony of plaintiff committed no error when it admitted this evidence.

Exception *Number One* is a general exception to nearly everything that the trial court did, but is directed to the contention of plaintiff that the decision is unsupported by the evidence and is contrary to the evidence.

Under the evidence in this case as contained in the Transcript and as referred to in this brief, we submit that the trial court was fully justified in concluding that plaintiff had failed to prove her contentions, and that its decision was supported by the evidence and was not contrary to the evidence. There may have been some conflict in the evidence but under the well established rule of this and other courts a judgment will not be reversed on conflicting evidence.

While discussing the exceptions of plaintiff we desire to call the attention of this Court to the statement made by counsel in his assignment of errors at page 450 and 451 of the Transcript. Counsel states: "and counsel for plaintiff then and there stated to the Court that he desired the Court to render findings when making his decision, and then and there counsel for plaintiff requested the said Court. Honorable Wm. H. Sawtelle, Judge presiding, to make findings of fact at the time he rendered his decision in said action. The said Court, Honorable Wm. H. Sawtelle, Judge presiding, then and there refused to grant the request of plaintiff, and stated that he would not make findings of fact in said action, because of the fact that the request for findings had not

been made before the commencement of the trial. To the Court's said action in refusing the request of plaintiff for findings of fact, the plaintiff then and there duly excepted."

We submit that the above is an extravagant *statement* of counsel. There is not a line in the record showing that plaintiff made such a request or that the Judge made the ruling stated or that an exception was taken to such ruling.

REVIEW AND COMMENT ON AUTHORITIES CITED BY PLAINTIFF.

Practically all of the cases cited by counsel for plaintiff from page 25 to page 32 of his brief deal with actions where the facts established a shortage in acreage in the quantity of land sold. They are not applicable to the case at bar because here there was no shortage. Plaintiff received title to 609.9 acres.

Taking up the cases in the order cited we have

FIRST:

Harrell v. *Hill*, 19 Ark. 102.

In this case the sale was in gross under a representation that there were 180 acres in the tract, whereas the tract was short 84 acres. At all times the owner of the property asserted that there were 180 acres in the tract, while for years he had given in his assessment to the County Assessor that it contained but 120 acres. The representations made by the owner of the property were known to him to be false at the time they were made and they were made for the purpose

of effecting a sale of the property. As above stated, there was no shortage in the case before this Court. Plaintiff received title to 9.9 acres more than she supposed there were in the tract.

SECOND:

Howes v. *Axtell,* 74 Ia. 400.

This was a sale of a tract of land as a whole on the representation of the owner that there were 84 acres in the tract, whereas the jury in the case found that there were only 75.79 acres, and that the owner had falsely and intentionally misrepresented the facts to the purchaser. There was a conflict in the testimony on this point and the judgment of the lower court was affrmed.

THIRD:

McComb v. *Gilkeson,* 135 Am. St. Rep. 944.

This was a sale of land as a whole upon a representation that it contained 245 acres. There was an actual shortage of ten acres in the tract.

FOURTH:

Salyer v. *Blessing,* 151 Ky. 459.

In this case the owner guaranteed to the purchaser that there were 1000 acres in the tract, whereas there were only 697 in the tract. The owner denied the quantity but the trial court found against him on the evidence and the appellate court sustained the decision. The lower court in disposing of the case found that the evidence showed that Salyer, the owner, represented and guaranteed that the boundary sold and intended to be conveyed by the deed, contained 1000 acres, when he knew that it did not. The sale was by

the acre.

FIFTH:

Cawston v. *Sturgis,* 29 Or. 331.

Here there was shortage and gross misrepresentation by the seller as to the number of square feet contained in the lots. The point was raised that the defendant did not intend to deceive the purchaser but the jury found against such intention, and there being a conflict in the evidence the verdict of the jury was not disturbed.

SIXTH:

Tyler v. *Anderson,* 106 Ind. 185.

Here, also, according to the complaint, there was a shortage in the tracts of land conveyed. The sale was by the acre. Anderson, the owner, represented to the purchaser that there were 240 acres in one tract and 80 acres in the other tract, and the purchaser paid for the land on the strength of such representations. Afterwards it was found that there were only 235.10 acres in one tract and 77.40 acres in the other. The owner, at the time she made the representations, knew that they were not true. This case was decided on demurrer but many points in the decision sustain the contentions of defendants in the case at bar.

SEVENTH:

Estes v. *Odom,* 91 Ga. 600

Here again there was a shortage in acreage. Estes represented the tract to contain 41.25 acres. He knew at the time that it contained only 33 acres. It was sold by the acre. The tract origi-

nally contained 41,25 acres, but prior to the purchase of Odom, Estes sold seven or eight acres to his brother. There was no question but that the fraud was committed. In addition Section 2642 of the Code of that State provided that "In the sale of lands, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price."

EIGHTH:

Kell v. *Trenchard,* 142 Fed. 20.

This, counsel for plaintiff states, is one of his best cases. What comfort he can get from it we are unable to see. The facts in that case are altogether different from the facts in this case as shown by the evidence. It would require much time and space to recite all the facts in the Trenchard Case, but the following are the main ones:

K, the owner, gave O an option for 90 days upon certain property fully described, consisting of lands, lumber plant, etc., also certain standing timber, described in the option, which consisted of not less than 35,000,000 feet. The purchase price was $60,000.00, of which sum $40,000 was to be paid in cash and the balance by note. Afterwards, proposed purchasers met K, the owner, with his agent, and K informed them that his agent would show them the property. They were driven over the land, or what they supposed to be the land, spending two days and covering some 20 miles. The agent represented that K owned the lands around which they circled, and in addition that he owned timber outside the boundaries pointed out. The timber was estimated at 40,000,000 feet on K's land. Afterwards the pro-

posed purchasers sent their timber expert to the land who was met by the same agent of the owner, and he went over the supposed boundaries again. The agent of the proposed purchasers estimated the timber on the land shown him to be 32,000,000 feet. The purchasers then decided to and did take over the property. Afterwards they discovered that the boundaries of the land had not been correctly pointed out to them by the agent of the owner and that there were only 8,232,100 feet of timber on the land owned by K., the remainder being on land owned by other parties.

There was glaring misrepresentation and fraud here while these elements are entirely absent in the case at bar.

The foregoing cases have been cited by plaintiff to show that the trial court committed error in admitting evidence showing that the ranch was sold as a whole. We submit that there is nothing in any of the cases tending to show that such error was committed.

The boundaries of the place were correctly pointed out by all the defendants. The plaintiff was told on several occasions by the defendants that they did not know how many acres there were in the ranch; that they never had it surveyed. The survey was made after the place was sold by Engineer Von Geldern, who states that he ran the lines around the exterior boundaries of the ranch established the fact that there were 609.9 acres in the tract, so there was no shortage in acreage.

The cases cited by counsel for plaintiff from

pages 80 to 113 of his brief are given for the purpose of showing that the sale was by the acre and not in gross. Under the facts in this case as presented by the evidence we can not see what difference it makes to plaintiff whether the sale was en masse or by the acre, except that if it had been by the care at the price mentioned by her the purchase price would have been some $1237.00 more than she paid, because there were 9.9 acres of land more than she thought he was getting.

In *Lang* v. *Merbach,* 105 N. W. 415, there was a shortage of 43.92 acres out of a total of 382.78 acres. The land was sold at $35 per acre, or $13,397.

In *Paul* v. *Swears,* 122 N. Y. S. 740, there was a shortage of 8 acres out of 48 acres. The sale was made with the knowledge of the owner that the farm did not contain over 40 acres, and under his representation that it contained 48 acres.

In *Landrum & Adams* v. *Wells,* 122 S. W. 213, there was a shortage of 53 acres out of 157 acres. The land was sold by the acre, and the owner knowingly misrepresented the quantity of land.

In *Emerson et al.* v. *Stratton,* 58 S. E. 577. there was an excess in acreage of 119.69 acres. As to one of the owners it was held that the sale was in gross and that he could not recover for the excess; as to the second owner the court expressed no opinion, except to say that she had commenced action against the wrong party.

In *Hall* v. *Graham,* 72 S. E. 105, the tract of exactly 90 acres was sold by the acre and it was short seven acres. The sale was made under a

deed containing general warrantes.

In *Gatis* v. *Buttrill,* 149 S. W. 347, there was a shortage of 39.43 acres out of a total of 573.43 acres. The sale was by the acre and under the representations of the owner that the tract contained 573.43 acres.

In *Rathke* v. *Tyler,* 111 N. W. 435, there was a shortage of 6.44 acres out of 100 acres. In discussing the case the court said: The main controversy is with reference to the recovery of the shortage in the quantity of land sold. Some question is made in argument as to the accuracy of the survey; but an examination of the record has satisfied us that the tract described in the deed contains but the acreage as computed by the surveyor. It will be noted that the description is followed by the words, "containing one hundred acres, more or less." *These words indicate a sale in gross even though the price stated be an exact multiple of the number of acres mentioned.*

This rule, however, was overcome by the evidence offered showing that the sale was made by the acre.

In *Boggs* v. *Bush,* 122 S. W. 222, there was an actual shortage of 12 acres out of 90 acres. The owner stated to the purchaser that he had the land surveyed and that it contained 90 acres. The court claimed that the sale was by the acre but the court said it was immaterial whether the sale was by the acre or in gross; there was a shortage and plaintiff was entitled to recover.

In *Brown* v. *Gookum et al.* 170 S. W. 803, there

was a shortage of 1264.1 acres of land which was sold at $2.00 per acre. The court gave judgment for $2,528.20 as a result of this shortage, the owner having knowingly and fraudulently misrepresented the acreage.

In *Lenoch* v. *Goss,* 157 Iowa, 314, there was a shortage of 17 acres out of 111 acres and the sale was made by the acre. The evidence showed fraud and misrepresentation on the part of the owner as to the number of acres contained in the tract.

Epes v. *Saundus, et al.* 109 Va. 99. Here the court held upon the evidence produced that the sale was by the acre and there was a shortage of 22.1 acres. The court did not hold that the sale was by the acre because the total purchase price, $2750, was a multiple of the number of acres represented in the tract because it was not a multiple. The holding that the sale was by the acre was based upon oral testimony.

Wardell v. *Birdsong,* 115 Va. 294. This sale was en masse by the terms of the contract. There was a shortage of 105½ acres out of 200 acres which the owner of the land stated the tract contained.

All the above cases have been cited by plaintiff to show that the sale of this ranch was by the acre. In other words, she contends that because 125 is contained into 75,000 just 600 times, that it is conclusive proof that the sale was by the acre. As we before stated it really makes no difference whether the sale was by the acre or en masse for there was no shortage in the quantity of land. However, the sale could not have been by the acre because it was not known how many

acres there were in the ranch. The plaintiff was told by each of the defendants on several different occasions that they did not know how many acres there were in the ranch; that they never had it surveyed. Surely this was sufficient to cause an investigation on the part of plaintiff if she had been buying by the acre.

It is impossible with the limited time at our command to examine all the authorities cited by plaintiff and we have not attempted to do so. We have selected at random from the cases cited by her in support of her contentions with the view of presenting to the court the facts from those cases in order that the court may compare them with the facts in the case at bar. In regard to the cases unnoticed by us we feel confident that an examination of the same would show nothing more than is shown from the above cases examined.

The cases cited from 119 to 139 of the brief of counsel for plaintiff relate to the question of agency. Undoubtedly all of them are good law when applied to the facts in each particular case. On this subject we are content to rest the case on the evidence and the cases cited by us.

On pages 173 and 174 of the brief of counsel for plaintiff he cites cases on the question of "confidential relations." All the cases cited are good law and we will concede that much. The trouble is the facts stated in those cases are not applicable here.

Again we affirm that the judgment of the trial court was supported by the evidence and was not contrary to the evidence. The plaintiff claims

that she was deceived by the following alleged representations of the defendants:

First: That there was a shortage in the quantity of land conveyed. This claim was disproved by the survey of the Engineer Von Geldern.

Second: That the boundaries of the ranch were not correctly pointed out to her. This claim is disproved by the testimony of the three defendants, the witness Dike, and the documentary evidence in the case.

Third: That all the land was subirrigated. This was an afterthought on her part for it did not occur to her until about the time she filed her amendment to her complaint. She did not mention it in the rescission suit; she did not mention it in the suit filed in the Superior Court of San Francisco; she did not mention it in her original complaint in this action. She discovered it about the time she filed her amendment some 4 years after she took possession of the ranch. However, the claim is disproved by the defendants and other witnesses who state that they never told her that any of the land was subirrigated.

Fourth: That all the land was clear and level. This was disproved by her view of the place. She was told that the land lying between the *old* levee and the river was used for wood and she asked the defendants if there was any market for wood. She could see this wood land from the road driven over by her when she examined the ranch and she was invited to go up on the levee and look at it more closely. Her excuse for not going up on the levee was because she had alame ankle, but all the defendants stated that she was

not lame and that she walked with them about the yard and buildings.

Fifth: That no part of the land was subject to overflow. This claim is disproved by two of the defendants who told her that the land overflowed when the levee broke and that the back part of the land overflowed when the water backed up from the Sacramento river.

Sixth: That the land was represented to her as containing 600 acres of first class alfalfa land. There was no evidence to substantiate such claim, and plaintiff knew from her own observations that much of the land was not in a condition to grow alfalfa.

Seventh: That at least 200 acres of the land was not worth more than $60.00 per acre. All of plaintiff's witnesses placed a valuation of more than $100 per acre on this tract alone.

That more than 70 acres of land was beneath the channel of a navigable river. There was no evidence of such a fact except partially from the witness Mulvany, and this is denied by the defendants and the survey of the engineer shows that it was not a fact.

Eighth: That plaintiff has been damaged to the extent of more than $21,000.00 which she has had to pay as Reclamation Taxes. Such taxes are always apportioned according to benefits and the presumption is that her land has increased in value by the expenditure of such assessment.

Ninth: That she, in purchasing said land, was guided by the advice of her proposed husband, F. I. Ramos, and that he was bribed. We

have fully covered this point in another portion of this brief and the evidence shows the claim to be untrue.

Tenth: Several other matters are claimed by plaintiff, but there was sufficient evidence to support the decision of the court that plaintiff had not been deceived or damaged.

In conclusion we are unable to see how this court can disturb the judgment of the trial court on the showing presented in this case. Plaintiff failed to prove any of the elements necessary to be proven in an action of this nature as recited on page 4 of this brief. No fraud was practiced upon her. She obtained full value for her investment, and we submit that the judgment should be affirmed.

A. H. HEWITT,
Attorney for Defendants in Error.

Personal service of the within brief is hereby admitted this ..... day of March, 1917.

LLOYD MACOMBER,
Attorney Plaintiff in Error.